

*United States Court of Appeals  
for the Second Circuit*



**APPELLANT'S  
BRIEF &  
APPENDIX**



75-2102

ORIGINAL

UNITED STATES COURT OF APPEALS  
SECOND CIRCUIT

-----x

ELIJAH EPHRAIM JHIRAD,

Petitioner-Appellant,

- against -

DOCKET NO. 75-2102

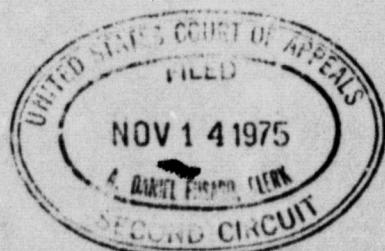
THOMAS E. FERRANDINA,  
United States Marshal,  
Southern District of New York,

Respondent-Appellee.

-----x

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APPENDIX TO APPELLANT'S BRIEF



TENZER, GREENBLATT, FALLON & KAPLAN  
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100 PARK AVENUE, NEW YORK, N. Y. 10017

**PAGINATION AS IN ORIGINAL COPY**

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CIVIL DOCKET  
UNITED STATES DISTRICT COURT

JUDGE

Jury demand date:

C. Form No. 106 Rev.

73 CV. 1630

| TITLE OF CASE  |              | ATTORNEYS   |                        |                                     |                                     |
|--|--------------|---|------------------------|-------------------------------------|-------------------------------------|
| <b>ELIJAH EPHRAIM JHIRAD</b><br><b>AGAINST</b><br><b>THOMAS E. FERRANDINA, UNITED STATES</b><br><b>MARSHAL, SOUTHERN DISTRICT, OF NEW</b><br><b>YORK</b> |              | For plaintiff:<br><b>TENZER, GREENBLATT, FALLON &amp; KAPLAN</b><br><b>235 East 42nd St.</b><br><b>R.H., N.Y. 10017</b><br><b>TE-7-0800</b> |                        |                                     |                                     |
|  |              | <i>1/23</i>   |                        |                                     |                                     |
|  |              | For defendant:<br><br><i>1/23</i>   |                        |                                     |                                     |
|  |              | <i>A TRUE COPY</i><br><i>RAYMOND F. BURCHARDT, Clerk</i><br><i>By <u>Frank</u></i><br><i>Frank</i>  |                        |                                     |                                     |
| STATISTICAL RECORD   | COSTS        | DATE  | NAME OR<br>RECEIPT NO. | REC.                                | DISB.                               |
| S. 5 mailed <input checked="" type="checkbox"/>  | Clerk        | <i>1/23/73</i>  | <i>1/23/73</i>         | <input checked="" type="checkbox"/> | <input checked="" type="checkbox"/> |
| S. 6 mailed <input checked="" type="checkbox"/>  | Marshal      | <i>1/23/73</i>  | <i>1/23/73</i>         | <input checked="" type="checkbox"/> | <input checked="" type="checkbox"/> |
| Basis of Action: <b>HABEAS CORPUS</b>  | Docket fee   |   |                        |                                     |                                     |
|  | Witness fees |   |                        |                                     |                                     |
| Action arose at:   | Depositions  |   |                        |                                     |                                     |
| <i>A-1</i>   |              |   |                        |                                     |                                     |

A. J. Jhirad

v.s. Thomas E. Vermandina

JUDGE

78 III. 65

| DATE       | PROCEEDINGS  |
|------------|--|
| 4-13-73    | Filed petition for a writ of Habeas Corpus.  |
| Apr. 17-73 | Filed Petitioner's affidavit & show cause order staying all, proceedings ret. 4-19-73.   |
| Apr. 19-73 | Before Duffy, J. Hearing begun & concluded on petition for writ of Habeas Corpus. Decision Reserved.   |
| 4-18-73    | Filed affidavit in opposition by E.A. Steinberg to Writ of Habeas Corpus.  |
| 4-26-73    | Filed memorandum submitted on behalf of the Government of India in opposition to Respondant's petition for a writ of habeas corpus.  |
| 4-26-73    | Filed petitioner's supplemental memorandum in support of petition for writ of habeas corpus.   |
| Jun 12 73  | Filed Stip & Order that all proceedings in the matter of Elijah E. Jhirad, Magistrate's Docket No. 72 MCA 1214 be, and the same hereby are stayed for a period of 10 days from the date hereof for the purpose of permitting petitioner to seek a further stay from the 2d Circuit Court of Appeals pending his appeal to said Court from the denial by the USCA of his petition for a writ of H/C.<br>Duffy, J.         |
| Jun. 8-73  | Filed Opinion #39544: Petitioner petitions for a writ of habeas corpus. This is the second writ sought by petitioner. The petition, for the writ of habeas corpus is denied. So ordered. Duffy, J.   |
| Jun. 11-73 | Filed pltr's. notice to appeal to appeal order dated June 8, 1973 denying a writ for habeas corpus.  |
| Jun. 25-73 | Filed Stipulation designation exhibits to be transmitted to USCA   |
| Jun. 25-73 | Filed notice that record on appeal has been certified & transmitted to the U.S.C. Appeals.   |
| Jan 17-74  | Filed petitioners Affid vit & order to show cause why an order should not be made barring the taking of any further evidence in these proceedings on the ground that presentation of such additional evidence would be contrary to the mandate of the Court of Appeals etc. as indicated rtble, 1-24-74.   |
| Jan. 30-74 | Filed Opinion # 40304- there is no law or statute cited in support of this shift from an extradition hearing standard to a habeas corpus standard and, while the argument may be somewhat novel and interesting, I find no legal basis to support it. Thus, the traditional extradition standards discussed above are controlling and the petitioner's request for further discovery is denied.<br>So ordered- DUFFY, J. |
| Jan 30-74  | One Trial Held before Goettel U.S. Mag.  |
| Feb 11-74  | PRE-TRIAL CONFERENCE HELD - Goettel, U.S. Mag.   |
| Apr. 26-74 | Filed additional findings on extradition proceedings- So ordered- Goettel, US Mag.   |
| May 7-74   | Filed petitioner's show cause order for a writ of habeas corpus with a stay and continuing his bail until such time his application has been determined.<br>Ret. 5-14-74 at 2:00 o'clock in the afternoon. DUFFY, J.   |
| May 20-74  | Filed memorandum of law in opposition to petition for a writ of habeas corpus.   |
| July 18-75 | Filed Opinion # 42819 and Order-- this is the third petition for a writ of habeas corpus brought in this international extradition proceeding. For the reasons stated, the petition for a writ of habeas corpus is denied.<br>So ordered- DUFFY, J. (m/n)  |
| July 23-75 | Filed Petitioner's notice of appeal from orders dated 7-17-75 and 6-8-75 and from each and every part thereof, which denied Petitioner's applications for a writ of habeas corpus. Copies to U.S. Atty and Steinberg & Steinberg   |
| Aug 29-75  | Filed petitioner's memorandum of law in support of petition.   |
| Aug 29-75  | Filed memorandum of Govt. of India in opposition to motion of stay of proceedings.   |
| Dec 20-73  | Filed USCA mandate and opinion reversing the orders of the district court remanding the action for further proceedings.  |
| Sept 2-75  | Filed stipulation designating exhibits for the appeal.   |

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B

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

ELIJAH EPHRAIM JHIRAD,

Plaintiff,

MEMORANDUM AND ORDER

-against-

THOMAS E. FERRANDINA,  
United States Marshal,  
Southern District of New York,

: 72 Civ. 4026 KTD

Defendant.

This case comes to this Court as an application by petitioner, Jhirad, for a writ of habeus corpus, attacking the jurisdiction of a United States magistrate to determine the appropriateness of extraditing Jhirad to India.

The Government of India has sought the extradition, pursuant to 18 U.S.C. § 3182, of Jhirad, who is a native Indian now a resident alien in this country. It is alleged that while Judge Advocate General of the Indian Navy, Jhirad embezzled large sums of money from a naval fund.

Normally, the procedure in an extradition matter, as set forth in 18 U.S.C. § 3184, involves the issuance of a warrant upon complaint and then a hearing before a

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magistrate, who determines whether there is sufficient evidence to sustain the charged offense under the applicable treaty of extradition. The determination of a magistrate is not directly appealable. Sayne v. Shipley, 418 F. 2d 679 (5th Cir. 1969), cert. den., 398 U.S. 903 (1970). The only method of attacking such a determination is by a petition for a writ of habeas corpus. Usually, such a writ is sought after a hearing by the magistrate. Here, however, petitioner has brought this petition before the hearing could take place. In several cases, including Wright v. Henkel, 190 U.S. 40 (1903) and Ivancevic v. Artukovic, 211 F. 2d 565 (9th Cir. 1954), cert. den., 348 U.S. 818 (1954), petitions have been heard prior to a hearing where there were unusual circumstances.

Petitioner has unfortunately sought to circumvent the normal orderly extradition procedures, and the Court wishes to strongly discourage this premature use of the writ. However, this case has been in limbo for nearly five months after the untimely death of the late Judge McLean, and the Court feels constrained to determine the merits of petitioner's claims.

At the outset, respondent has suggested that a writ of habeas corpus under 28 U.S.C. § 2241 will not lie because petitioner, free on bail, is not "in custody" as the statute

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requires. Until recently, the "in custody" requirement meant that a prisoner would have to be incarcerated before he could use the writ of habeas corpus. However, the "in custody" requirement has recently been interpreted with greater latitude. In Jones v. Cunningham, 371 U.S. 236 (1963), the Supreme Court held that a prisoner on parole under the custody and control of a parole board is "in custody" within the meaning of 28 U.S.C. §2241. Likewise, five years later the Supreme Court in Carafas v. LaVallee, 391 U.S. 234 (1968), determined that the fact that a petitioner's sentence had expired while his petition for the writ was on review, did not defeat jurisdiction under the Federal statute. Subsequently, the lower courts have expanded the situations in which jurisdiction to grant a writ of habeas corpus will lie. In Marden v. Purdy, 409 F. 2d 784 (5th Cir. 1969), it was held that a state prisoner free on bond could seek a writ of habeas corpus and in 1970 the same court decided that release on appeal bond was "in custody" for Federal jurisdictional requirements. Capler v. City of Greenville, 422 F. 2d 299 (5th Cir. 1970).

Two district courts in this Circuit have echoed the new approach to the "in custody" requirement. Judge Bryan in Duncombe v. New York, 267 F. Supp. 103 (S.D.N.Y. 1967), by way of dictum, suggested that a person released on bail

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is legally in custody for the purpose of the habeas statute. In U.S. ex rel Smith v. DiBella, 314 F. Supp. 446 (D.Conn. 1970) the Court held that a petitioner released on his own recognizance was in custody for the purposes of the Federal habeas corpus statute. The underlying reasoning in all of these decisions is that to fall within 28 U.S.C. § 2241, one's liberty of movement must be limited in some substantial way. Though petitioner Jhirad is out on bail, the Court finds that the restrictions on his freedom implicit in his being on bail are such as to come within the import of the statute. Therefore, the Court has power to entertain this application.

The scope of inquiry open to a Federal District Court when deciding a writ of habeas corpus in an extradition case is very narrow, being limited to the following questions:

- 1) whether the magistrate has jurisdiction;
- 2) whether the evidence produced at the hearing showed a reasonable ground to believe the accused guilty; and
- 3) whether the offense alleged is a treaty offense.

Wacker v. Bisson, 348 F. 2d 602 (5th Cir. 1965); Sayne v. Shipley, 418 F. 2d 679 (5th Cir. 1970), cert. den. 398 U.S. 903 (1970); U.S. ex rel Petrushansky v. Marasco, 215 F. Supp. 953

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(S.D.N.Y. 1963), aff'd 325 F. 2d 562 (2nd Cir. 1963), cert. den. 376 U.S. 952 (1964), and Application of D'Amico, 185 F. Supp. 925 (S.D.N.Y. 1960), appeal denied, 286 F. 2d 320 (1961).

Since there has been no hearing in this case, we are concerned only with the jurisdiction of the magistrate and whether the offense charged is a treaty offense.

18 U.S.C. § 3184, Factor v. Laubenheimer, 290 U.S. 276 (1933). Of course, the threshold question is whether an extradition treaty exists.

The United States Marshal, Ferrandina, the nominal respondent, and the Government of India, the real respondent to this action, argue that the extradition treaty of December 22, 1931, 47 Stat. 2122, between the United States and Great Britain, serves to support jurisdiction in this case. This Treaty in Article 14 stated that Great Britain could accede to the Treaty on behalf of certain listed territories, among which was India. On March 9, 1942, the Treaty was made effective as to British India. For the following reasons this Court holds that the Treaty of 1932 is valid and of continuing force between the Governments of India and the United States, and will support the jurisdiction of the magistrate to hear the evidence against Jhirad.

Whether an extradition treaty exists is an issue with major foreign policy implications and one which does not

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easily fall within the sphere of the Judicial Branch of Government. Thus, it is that courts have given great weight to the position taken by the Executive Branch concerning the validity of extradition treaties. In Sayne v. Shipley, 418 F. 2d 679 (5th Cir. 1909), cert. den., 398 U.S. 903 (1970), the Fifth Circuit said:

"Because we recognize that the conduct of foreign affairs is a political, not a judicial function such advice [from the Executive Branch] while not conclusive on this Court is entitled to great weight and importance." (418 F. 2d at 684)

In the case at bar, the United States, through the Acting Secretary of State, certified on August 14, 1972, that "the treaty of extradition between the United States and India is therefore considered a good subsisting and binding convention between the United States and India." Further, the Executive Branch strongly indicated its continuing affirmation of the Treaty when (in July of 1967), in conjunction with a prior extradition between the United States and India, notes were exchanged between the two Governments.

The position of the Executive Branch, though persuasive, is not conclusive. The Court must evaluate the facts concerning the Treaty on its own. Petitioner argues that the Treaty of 1931, under which extradition is sought, though made applicable to British India in 1942, did not survive the creation of the Republic of India in 1950.

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As with much of international law, the question of treaty succession is muddled. Yet, it seems generally agreed that some rights and duties do devolve on the new country, particularly those rights and duties locally connected to the area gaining independence. See Oppenheim, International Law, Vol. 1 at 157 - 158.

Particularly in reference to emerging nations, the weight of authority supports the view that new nations inherit the treaty obligations of the former colonies.

As one authority has said:

"There is a tendency in the direction of continuity of treaties upon independence of colonial territories which has been evident for some time respecting multilateral legislative conventions and a fairly wide spectrum of bilateral treaties." (O'Connell, State Succession in Municipal Law and International Law, 1967, at 113)

In Ivancevic v. Artukovic, 211 F. 2d 555, (9th Cir. 1954), cert. den., 348 U.S. 818 (1954), the Ninth Circuit decided that an extradition treaty made between the United States and the Kingdom of Serbia survived the creation of the Federal People's Republic of Yugoslavia. Though relying in large measure on the view of the Chief Executive, the Court also emphasized that there was sufficient continuity between the first Government and the second, even though there was not geographic identity. Applying this principle of continuity, it is reasonable to

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find that the Republic of India inherited these treaties. With the exception that Pakistan was separated from British India, there was geographical identity between India in 1946 and 1950. Further, as part of the creation of the Dominion of India, the Indian Government agreed to take an assignment of all treaties signed on its behalf by Great Britain. Therefore, the Treaty of 1931 was in effect in 1946. The subsequent change to a Republic was certainly of only evolutionary nature; thus the Treaty would appear to survive.

Jhirad relies heavily on State of Madras v. Menon, (1955) 1 S.C.R. 280. The Supreme Court of India in that case held that an act of the British Parliament, (the Fugitive Offenders Act of 1881) which set conditions for extradition among British possessions, was no longer valid after the creation of the Republic in 1950. Reliance on this case is misplaced. The basic feature of the Fugitive Offenders Act was that it made for simplified procedures among British possessions. The Fugitive Offenders Act was an internal statute while the Treaty of 1931 was an external act whereby India as an international person gained rights and obligations vis-a-vis another international person. Further, a recent opinion of the Supreme Court of India in

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West Bengal v. Kishore, (1969) 3 S.C.R. 320, raised serious questions as to the continuing appropriateness of relying on the Menon decision.

Lastly, the United States Supreme Court has held that the actions of the two countries involved regarding an extradition treaty are of great importance in deciding a treaty's validity. Terlinden v. Ames, 184 U.S. 270 (1902) Both the Government of India and the Government of the United States have been unequivocal in relying on the validity of the Treaty of 1931 and in the past there have been extraditions from both countries.

Mindful of the advice of the Executive Department, the actions of both governments and relying on the historical continuity from British India to the Republic of India, this Court holds that the Treaty of 1931 is validly existing between India and the United States.

The second issue raised by the petition for habeas corpus is whether the crime charged is an extraditable offense. Petitioner, Jhirad, has been charged with the crime of Breach of Trust of a Public Servant, § 409 of the Indian Penal Code (IPC). The IPC defines a criminal breach of trust in Section 405 as occurring when

" . . . whoever, being entrusted with property . . . dishonestly misappropriates or converts to his own use that property in violation of any direction of law . . . "

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After stating this general definition in Section 405, the IPC goes on in subsequent sections to enumerate differing penalties based on the status of the entrustee. Section 409 is merely a statement of a specific penalty for the general crime contained in Section 405. Though called "breaches of trust", the crimes defined by Sections 405 and 409 are in essence crimes of embezzlement. They satisfy the classical definition of embezzlement stated by Blackstone in his Commentaries:

"The fraudulent appropriation to his own use or benefit of property or money entrusted to him by another, by a clerk, agent, trustee, public officer or other person acting in a fiduciary character."

4 Blackstone's Commentaries, 230, 231.

Article Three of the Treaty of 1931 lists the extraditable offenses and includes larceny and embezzlement in clause 16 and fraudulent conversion in clause 17. The courts have set a standard of liberal interpretation of treaty language. As the Supreme Court said in Factor v. Laubenheimer, 290 U.S. 276 (1932), "extradition treaties are to be liberally, not strictly, construed." From the general lack of particularity and specificity of the crimes listed in Article Three, it is evident that the intention was to describe the crimes in the most general and inclusive terms. In light of this intention and the standard of interpretation set by the Supreme Court in the Factor case, the

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Court finds the crime charged is included within the ambit of clause 16 of the Treaty.

In Wright v. Henkel, 190 U.S. 40 (1903), the Supreme Court, while deciding whether an extraditable offense was stated, said:

"The general principle of international law is that in all cases of extradition the act done on account of which extradition is demanded must be considered a crime by both parties." 190 U.S. at 58.

This apparently was the law until Factor v. Laubenheimer, supra, 290 U.S. 276. In that case the Court indicated that the question of whether the crime charged must be a crime in the asylum country was a matter of treaty interpretation. The Court went on to indicate that, at most, all that was necessary was that the offense charged was recognized by the jurisprudence of both countries. There is no requirement in Article Three of the Treaty that larceny or embezzlement be crimes in the asylum country. Indeed, the Treaty lists only one offense which must be a crime in both countries to be extraditable, and that is accessory conduct of any kind. It follows, therefore, that the Treaty does not require that the crime charged be explicitly a crime in the place of asylum.

Even if it were necessary for extradition that there be mutual criminality, it seems quite clear that

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the acts alleged fall within the ambit of liability of § 155.05 of the New York Penal Law (McKinney 1967) which makes a wrongful taking or withholding of property from its owner a crime. It specifically includes embezzlement, without regard to the status of the person committing such act. It seems clear that the offense charged is within those listed as being extraditable.

Also, in determining whether the offense charged against petitioner, Jhirad, is extraditable, the Court must determine whether the Treaty sets any time limitations on extradition and, if so, whether they have been complied with. Merino v. United States Marshal, 326 F. 2d 5 (9th Cir. 1963), cert. den., 377 U.S. 997 (1964). Under Article Five of the Treaty of 1931, otherwise permissible extradition cannot take place if the passage of time has caused an exemption from prosecution or punishment "according to the laws of the High Contracting Party applying or applied to." Thus, both United States law, as well as Indian law, must be considered to determine whether the extradition is time barred. See Hatfield v. Guay, 87 F. 2d 358 (1st Cir. 1937), cert. den., 300 U.S. 678 (1937), (construing the same Treaty).

Given that the Treaty commands reference to the law of the United States, should it be Federal law or State

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law? It has been suggested that the New York Statute of Limitations should be applied. Cited in support of this contention is In re Mylonas, 187 F. Supp. 716 (N.D.Ala. 1960). The Mylonas decision stands as a lone example of this approach. If extradition were to be barred by the capricious location among the states of the person sought to be extradited, it strikes this Court that the basic intention of international treaties of extradition, namely uniform, regularized extradition between nations, would be thwarted. Because of this clear over-riding Federal interest in treaties of extradition, we will look to Federal law regarding the limitations question. Cf. Garcia-Guillern v. U.S., 450 F. 2d, 1189 (5th Cir. 1971), cert. den. 405 U.S. 989 (1972).

The Federal Statute of Limitations with regard to non-capital offenses is 18, U.S.C. § 3282. In relevant part, the statute states, "no person shall be prosecuted . . . or punished for any offense, not capital unless the indictment is found or the information is instituted within five years next after such offense shall have been committed." The alleged series of offenses for which petitioner is charged, took place from 1959 through 1961. To be within the five year period under Section 3282, prosecution would have to have been brought by September 26, 1966 at the latest, since the last alleged transaction occurred on the

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27th of September 1961. Petitioners and Respondents agree that prosecution in this case was not begun until October of 1968, well after the five year period had expired.

Under 18 U.S.C. 3290 the five year limitations period does not extend to persons "fleeing from justice". Jhirad left India on July 26, 1966, which, if it constituted a "fleeing from justice" would have tolled the statute as to those offenses occurring less than five years before his departure, namely, the alleged transactions on July 27, 1961, September 25, 1961, and September 27, 1961. Petitioner argues that mere absence from the place of the offense will not suffice to prove "fleeing from justice", rather, an intention to avoid arrest or prosecution must be shown.

Turning to the construction of 18 U.S.C. § 3290, the Circuits are divided as to whether to be fleeing from justice, one must intend to escape prosecution. The Fifth Circuit, over a vigorous dissent, held in B. M. Donnelly v. U.S., 229 F. 2d 560 (5th Cir. 1956) that intent must be proved and that mere absence was not sufficient to show "fleeing from justice". However, two other Circuits have held that mere absence from the jurisdiction was sufficient.

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In McGowan v. U.S., 105 F. 2d 791 (D.C. Cir. 1939), cert. den., 308 U.S. 552 (1939), the Court held that in the Statute of Limitations 18 U.S.C. § 538, the predecessor of Section 3290, "fleeing from justice" meant one who is gone from the jurisdiction without regard to intent. Likewise, the Eighth Circuit, in construing Section 538 held that to be fleeing, all that was necessary was to have left the jurisdiction of the crime after its commission. Though not of great weight in determining what the language of Section 3290 means, it is worth noting that all of the cases construing the phrase "fleeing from justice" in the extradition statute 18 U.S.C. § 3182 have held that fleeing is proved by mere absence. See Appleyard v. Massachusetts, 203 U.S. 222 (1906) and Roberts v. Reilly, 116 U.S. 80 (1885). This Court finds that petitioner was fleeing from justice by his mere absence from India in 1966. In addition to the case law supporting this view, the Court is persuaded by the fact that the alleged offenses of petitioner are of a type which are likely to go undiscovered for long periods, thus delaying prosecution and making this type of action easily time-barred. If the Court were to decide that fleeing from justice occurred only when there was a finding of an intention to avoid prosecution, the Court would be put in a

position of finding the facts surrounding a crime which has occurred in another country. We are reluctant to assume such a role. As to the last three alleged offenses, the Statute of Limitations as set out in 18 U.S.C. § 3290 would not bar extradition.

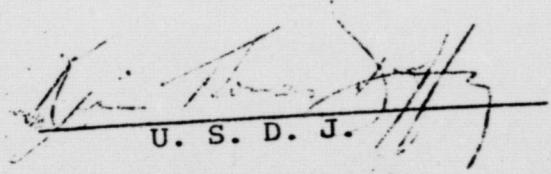
Article Five of the Treaty mandates that the Court also look to see if the law of India bars this action because of delay. India has no Statute of Limitations, but rather applies a case law principle of unreasonable and unfair delay. Since the Indian rule is a case-by-case approach, dependent upon the facts of each case, it would be very difficult for this Court to suggest that the time period here is so unreasonable as to require barring this action under Indian law. The facts as presented to the Court do not compel a finding of unreasonableness; on the contrary, they indicate careful investigation on the part of the Indian Government, which of necessity took some time.

The Court finds that the magistrate has jurisdiction and that the last three offenses alleged are extraditable.  
The Court does not decide whether or not all of the alleged offenses might, in fact, constitute one extraditable offense as we find such a determination to be unnecessary.  
The stay of the magistrate's hearing is hereby vacated.

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The petition for writ of habeas corpus is denied.

SO ORDERED.

  
U. S. D. J.

Dated: New York, N. Y.  
January 23, 1973.

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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

Second Opinion

In the Matter of the Extradition of

OPINION

ELIJAH EPHRAIM JHIRAD

: Mag. Dkt. # 72MCA1214

Fugitive from the Justice of the  
Government of India

:

:

X

GOETTEL, U.S. Magistrate

A hearing has been held at the request of the  
Government of India for the Extradition of Mr. Elijah Ephraim  
Jhirad, allegedly a Fugitive from the Justice of that country.  
At an extradition hearing a Magistrate must determine five  
things:

1. whether the extradition requisition is  
in proper form;
2. whether the offense charged is extraditable;
3. whether the person before the Court is  
the one accused of the crime;
4. whether there is probable cause for  
holding the accused for trial; and
5. is the extradition intended to punish  
the accused for offenses of a political  
nature.

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Respondent was arrested in August of last year on a warrant issued upon an extradition complaint and has been free on bail every since. A pre-hearing motion to dismiss made by Respondent was denied. A writ of habeas corpus was also denied by Judge Duffy and is presently on appeal. The issues raised at that time were threefold:

First, an attack upon the procedural regularity of the requisition, claiming that no treaty exists between India and the United States. This issue was decided adversely to the Respondent thus disposing of the first of the issues normally decided at an extradition hearing.

The second issue raised preliminarily was whether the crime charged was extraditable. That issue was also decided adversely to the Respondent, thereby disposing of it.

The third issue was a defense of statute of limitations. It is fair to say that the decisions of this court and the district court were not entirely conclusive on that point, and it will be discussed separately later.

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Of the remaining issues, the question of identity is easily disposed of. There has never been any real dispute, and indeed Respondent has taken the stand and acknowledged, that he was the former Judge Advocate General of the Indian Navy, and is obviously the person who is being sought by the Indian Government. The crucial issue, therefore, is the question of probable cause.

Respondent is charged with having embezzled 842,457 Rupees, which is approximately \$165,000 in American money. Certain facts are uncontested. Mr. Jhirad was from 1947 through 1964 the Judge Advocate General of the Indian Navy. During 1964 he took a leave of absence. On July 26, 1966, he flew to Brussels with his family, where he attended a World Jewish conference. From there he went to Geneva where he lived openly, entertaining foreign dignitaries including those of India. Some months later he immigrated to Israel and became an Israeli citizen. He never returned to India and never again took up his post as Judge Advocate General. In June of 1971, he came to the United States on a visa, and obtained employment here.

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In late 1958, during the time that Mr. Jhirad served as Judge Advocate General of the Indian Navy, a Prize Fund Account was set up. Between 1959 and September of 1961, Respondent was administrator of this Naval Prize Fund. The Fund had been set up for distribution to Indian Navy personnel who had served for more than 180 days during World War II, <sup>pursuant</sup> to a proclamation of the Indian Government issued on January 31, 1956, which announced the existence of the Prize Fund and called upon those eligible to participate to file their claims.

The exact amount to be paid to claimants could not be determined until such time as the total number of claimants and their ranks (which determined their relative share) had been established. When this was done, the funds available were to be divided amongst the eligible claimants according to their scale of distribution.

Respondent, in addition to being responsible for the overall administration of the fund, was personally responsible for the distribution of funds, was a co-signatory

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on all withdrawals from the fund, and was charged with seeing that the fund was properly administered and accounted for. Between February of 1959 and September of 1961 virtually all the fund of over \$400,000 was disbursed. No formal audit of the account was ever made.

In 1966, as a result of an inquiry from a sailor, an inquiry was initiated concerning the distribution of the funds. (The Fund itself had been closed and the Respondent placed on leave a couple of years earlier.)

It was found that many of the books and records of the Fund had been already destroyed, and that the account could not be audited at that time. However, from those records available, primarily the checks, it was established that Mr. Jhirad had drawn the bulk of the account, the equivalent of \$275,000, out of the bank in cash. During this time period, large sums of cash were deposited to several personal accounts of the Respondent, and cash was used by him to pay various stockbrokers and commodity brokers. It was also established, however, that a number

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of the claimants were not paid by check, but by money orders and that these money orders were often purchased by cash.

A criminal investigation was commenced in July of 1966. The investigation had been underway only a few months when Mr. Jhirad left India never to return. In 1968, two years after he had left India, three "charge sheets" were filed against Mr. Jhirad. A charge sheet appears to be roughly equivalent to our Criminal Complaint. Each of these charges Mr. Jhirad with violation of Section 409 of the Indian Penal Code: criminal breach of trust by a public servant, an aggravated form of embezzlement punishable by ten years imprisonment and a fine.

The reason why three separate sheets were filed charging the same crime is that, under Indian criminal procedures, embezzlements may be treated as a single offense, but not for a period of more than one year. Consequently, the first charge involves alleged embezzlements between May of 1959 and May of 1960; the second involves alleged embezzlements between June of 1960 and June of 1961;

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and the third and final sheet charges alleged embezzlements between July and September of 1961.

Prior to seeking the extradition of Mr. Jhirad, a hearing was held before the Additional Chief Magistrate in India. A wealth of evidence, a number of witnesses and exhibits were presented to him. These exhibits and witnesses established beyond any doubt that Mr. Jhirad had transferred large sums of money from the Prize account to his own accounts and personal uses. This was established by similarities of amounts withdrawn and deposits on the same dates, sometimes even in identical amounts and similar denominations of currency. It was an inescapable conclusion from the evidence and bank deposit analysis presented before the Indian Magistrate that monies had indeed been transferred from the Prize account to Mr. Jhirad's personal accounts.

The evidence before the Magistrate also tended to prove that Mr. Jhirad had lost heavily during the same period investing in the stock market and in commodities, and that he had personally ordered the destruction of the records without their having been audited.

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All of the evidence presented before the Indian Magistrate was properly certified and presented to this court. Respondent contends that this evidence fails to establish probable cause since there is no proof that any part of the Naval Prize Fund is missing or that anyone entitled to share in the funds was not paid.

India attempted to prove that a number of former seamen who were entitled to participate in the Fund were not in fact paid. Their evidence was insufficient in that, although they showed that these persons were entitled to file claims against the Fund, there was no proof that they had in fact filed timely claims. [However, it is not necessary to prove that a particular valid claimant was deprived of his proper payment. There are a number of ways to embezzle from a fund of this nature, but the most dangerous way would have been to have diverted payments due to eligible claimants, because this would almost certainly have raised a protest from them.

Other ways in which funds could have been embezzled were by enlarging the number of claimants by adding fictitious

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names, by miscomputing the amount to be paid to proper claimants, or by appropriating unclaimed funds when claimants had died or disappeared following a submission of their claims. Other ways of tapping the fund surely exist, so it certainly is not necessary to show that the monies were taken from persons who had filed proper and timely claims. All that is necessary is to establish that assets were misappropriated by Mr. Jhirad.]

Respondent cites Tinsley v. Bauer, 271 F.2d, 110 (Calif. 1954) for the proposition that the fact that a portion of the Fund is missing is irrelevant to Respondent's guilt. That was a civil case which involved an alleged embezzlement where the evidence merely established the placing of certain funds in the account of the bookkeeper. The Court held that this was an inadequate basis to establish the amount actually embezzled from the employer. The Court specifically distinguished the effect of such evidence in a criminal proceeding and held that it certainly would be some evidence of a criminal act. The Appellate Court returned that case to the trial Court merely for a further determination

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as to what amounts had actually been taken from the company's accounts.

Respondent also contends that the transfer of funds from the Prize Fund, to the personal account of Mr. Jhirad is not even evidence of criminal intent, citing People v. Von Csch, 9 A.D. 2d 660 (1st Dept., 1959). In that case, however, the defendant had been specifically allowed to deposit the monies wherever he desired, including his personal account, and it was held that the embezzlement was committed not when he deposited the funds in his personal account, but when it was established that he removed the monies from those accounts and used them for his personal ends.

Criminal intent can be inferred from the nature of the conversion. In this case, the Respondent took the stand, admitted freely having withdrawn monies from the Prize Fund and having deposited them into his personal accounts. His explanation was that he received substantial amounts of cash from his own private practice of the law and from his stock market transaction, and he had it on hand

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while he did not keep cash from the Prize Fund account. Consequently, on occasions when he had to obtain money orders and needed cash for that purpose, he testified that he advanced his own funds to make such purchases and subsequently repaid himself by making the transfers previously described.

There is a substantial question as to whether or not this defense can be considered at this time. It is clear that in an extradition hearing a Respondent cannot offer evidence which contradicts the evidence of the extraditing country. Here, however, the only evidence which clearly contradicts the evidence of the Government of India is Mr. Jhirad's testimony that he did not direct the destruction of the records of the Prize Fund, and, perhaps, his summary contention that his investments were profitable overall. To the extent that this evidence contradicts the evidence of the Government of India, I have ignored it.

This, however, does not solve the entire problem of the defense that the monies were transferred as a repayment

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for advances previously made. In the case of Charlton v. Kelly, 229 U.S. 447 (1913), the Supreme Court held, at p. 461:

"There is not and cannot well be any uniform rule determining how far an examining magistrate should hear witnesses produced by an accused person. The proceeding is not a trial. The issue is confined to the single question of whether the evidence for the state makes a prima facie case of guilt sufficient to hold the party for trial."

The Court held that evidence in the nature of a defense, in that case insanity, should not be heard by the committing Magistrate.

In Collins v. Loisel, 259 U.S. 309 (1922), a case relied upon by the Respondent to establish that the accused could testify to explain ambiguities or doubtful elements of the prima facie case, the Supreme Court explicitly upheld the exclusion of certain evidence as relating to a defense, citing In Re Wadge, 15 Fed8644 (S.D.N.Y., 1883)), that to allow defensive evidence at such a hearing would compel the Government seeking the extradition to be prepared for a full-scale trial and to produce all its evidence and

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witnesses, both on direct and rebuttal.

It is clear, however, from such cases as Application of First National City Bank, 183 F.Supp. 865 (S.D.N.Y. 1960) that Respondent is still allowed to explain ambiguities or doubtful evidence in the elements trying to establish a *prima facie* case. But it is difficult to say whether the testimony presented by Mr. Jhirad is simply an explanation of ambiguities, or whether it is a separate affirmative defense.

In Hatfield v. Guay, 87 Fed. 2d, 358 (1st Cir., 1937), evidence that an accused's false pretenses did not cause a payment to be made to him, since the foreign government did not rely on those allegedly false pretenses, was held to be a defense and not an explanation. Evidence of absence from the country, insanity, alibi, all of these have held to be defensive material.

In First National City Bank v. Aristeguieta, 287 F.2d 219 (2d Cir., 1960), it was held that the defenses available to an accueed are extremely limited. Indeed, you can search the cases in vain for a single instance in which

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a defendant in an extradition proceeding was allowed to present a defense (other than one specifically set forth in the treaty as an exemption from extradition) which was considered allowable under the circumstances. I conclude, therefore, that the evidence presented by Mr. Jhirad is more properly to be considered by a Court in India where all the evidence would be available and where India would be able to present its rebuttal evidence to meet his contention that the monies were transferred in repayment of advances made by him.

Moreover, even if this defense is properly considered at this time, the evidence is not conclusive on the question of probable cause. To put it mildly, the actions of the Respondent, even accepting his version, were extremely unwise. All lawyers appreciate the sanctity of trust funds. The transferring of these funds from trust accounts to his own use had to give an appearance of fraud. His explanation for this -- the convenience of having funds available rather than going to the bank on various occasions, is not completely believable considering the

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frequency and proximity of these transfers.

For example, according to the evidence presented by the Government of India, on October 13, 1959, Mr. Jhirad withdrew 6,000 Rupees and on the same day deposited 4,500 to his own account. Two days later he withdrew 8,000 Rupees and deposited 7,900 to his own account. On December 1, 1959, he withdrew 5,000 and deposited 4,700. Two days later, he withdrew 30,000 and deposited 10,000. On December 28, 1959, he withdrew 8,000 Rupees and deposited 7,600. Within a week thereafter he withdrew 4,000 and 6,000 and deposited identical amounts.

On April 6, 1960, he withdrew 50,000 and deposited slightly in excess of that. The following day he withdrew 20,000 and deposited the exact same amount.

On three consecutive days in September of 1960 he made large deposits following large withdrawals, and the amounts are almost exactly coincide and a few days later there is another deposit of 15,000 Rupees following a withdrawal of 15,000.

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The same sequence of events occurs in October of 1960, where over a period of a week there are four large withdrawals and four large deposits.

The same set of circumstances can be found in January of 1961, where over a four-day period there are three large withdrawals and three large deposits.

Coming to the charges involved in the last charge sheet, in July of 1961 and September of 1961, we find again a series of withdrawals and deposits separated by only a day or two each time. Withdrawals and deposits.

It is extremely difficult to accept the contention that these withdrawals and deposits were made to repay advances. It would be purposeless to make withdrawals from the bank to repay advances made on the exact same days, or even on the intervening days.

I find, therefore, that there was probable cause for requiring Respondent to appear in India to answer some of the charges against him. This, however, does not dispose of all of the issues raised.

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As I mentioned earlier, there is a question of limitations. It was held in Hatfield v. Guay, supra, that an exemption from prosecution by lapse of time is a matter of defense to be considered at trial unless specified in the treaty as a ground for declining extradition. Article 5 of the Treaty between the United States and India specifically makes a limitations defense grounds for declining extradition, if it is a bar to extradition under the laws of either country. The prior decisions of this Court and the District Court held that at least the last few transactions were not barred by the United States five-year statute of limitations. (India does not have a formal statute of limitations as such, and proceeds on a laches basis applied at the conclusion of the case and certainly of no help to Respondent at this juncture.)

The prior decisions left open the question of whether the entire embezzlement could be treated as a single offense, so that no part is time barred. As mentioned earlier the Indian Penal Code allows embezzlements to be treated as a single offense, but only up to the maximum of a one-year.

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India's legal expert testified that all of the three charges, covering a period of two years and four months, cannot be treated as a single offense. Therefore it appears that all of the transactions involved in the two oldest charge sheets are more than five years old and are time barred.

India argues that we should consider the law of the United States on this point, since we are applying the United States statutes of limitations. (There is some authority for treating embezzlement as a single continuing offense.) This argument overlooks the fact that we are applying our statute of limitations simply because the Treaty requires us to. Admittedly this engrafts onto the law of India a provision for which it does not have a similar equivalent. However, in looking at the crime itself, we are governed by the law of India for the nature and elements of the crime as well as its duration. Since India treats these as three separate offenses, and the first two are time barred, respondent may be extradited only on the last of the three charges against him.

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This leaves a final issue. Respondent contends that he should not be extradited because he would not get a fair trial in India and, moreover, that his extradition is politically motivated. I have previously ruled that the first part of the question, concerning the fairness of the jurisprudence administered by the Indian Courts, is not properly before me. In Re Neely v., 103 F. 631, (2d Cir., 1900), affirmed, 180 U.S. 109 (1901).

This leaves only the question of whether or not the prosecution here is barred because of its alleged political motivation. Article 6 of the Treaty has some rather ambiguous language to the effect that the extradition will not be allowed if it is sought "with a view to ... punish him for a crime or offense of a political character".

It is admitted that the offense itself is not of a political nature. It is contended, however, that the motivation of the Government of India in seeking this extradition is political, and that underlying motivations must be considered.

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It is questionable whether the ambiguous language within the treaty allows us to examine the motives of the Government of India in seeking Mr. Jhirad's extradition. In any event, the evidence is insufficient to establish that prosecution and extradition are politically motivated.

The evidence did establish that Mr. Jhirad was an outspoken apostle of the cause of the new nation of Israel. He advocated friendship with India with Prime Minister Nehru, Krishna Menon and other India leader of the time. This was unpopular since India is aligned with the Arab bloc of nations. He testified that as a result of his political activities on behalf of Israel, he was subject to surveillance and to criticism from his superiors. Nevertheless, the evidence also establishes that he was allowed to continue to hold a high Government post; that he was not forced to retire, and indeed, was furnished with government quarters while on extended leave of absence; that he was bestowed with the title of Senior Advocate by the Bar Association; that his political activities were not inhibited to any noticeable degree; and, finally, he was allowed to leave India to attend

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a Jewish World Conference in Brussels. (This latter privilege was apparently an error on the part of the Indian government in light of the then pending criminal investigation.) I find, therefore, that the extradition is not politically motivated.

In conclusion, therefore, Respondent is ordered committed to the custody of the Attorney General; these findings including a transcript of evidence and exhibits taken herein will be certified to the Secretary of State for appropriate action. The motions of Respondent to dismiss the proceedings are denied.

SO ORDERED

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Gerard L. Goettel  
United States Magistrate

DATED: New York, New York  
April 12, 1973

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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----x  
ELIJAH EPHRAIM JHIRAD, :  
Petitioner, :  
-against- : OPINION AND ORDER  
THOMAS E. FERRANDINA, : 73 Civ. 1630 (KTP)  
United States Marshal for the :  
Southern District of New York, :  
Respondent. :  
-----x

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KEVIN THOMAS DUFFY, D. J.

Elijah Ephraim Jhirad petitions for a writ of  
habeas corpus. This is the second writ sought by petitioner  
in this very protracted and complicated extradition matter.  
In an earlier opinion Jhirad v. Ferrandina, 355 F. Supp. 1155  
(S.D.N.Y. 1973), I denied Jhirad's first petition, which was

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brought before a hearing could be held by the magistrate. The facts of this case are set out in great length in the prior opinion, and I shall only briefly reiterate them here.

The Government of India (the real respondent to this action) has sought the extradition of petitioner Jhirad pursuant to 18 U.S.C. §§3182 and 3184. India contends that Jhirad, while Judge Advocate General of the Indian Navy, embezzled a substantial sum of money from a prize fund set up to recompense naval veterans, which he administered.

The normal scenario of events in an extradition case begins with the issuance of a warrant for the detention of the alleged fugitive. Thereafter, the magistrate holds a hearing to determine whether the party before him is in fact the party sought and, if so, whether or not the requesting government can demonstrate probable cause that the fugitive committed an extraditable offense. The decision of the magistrate is not directly appealable; however, it can be attacked by means of a writ of habeas corpus. Sayne v. Shipley, 418 F. 2d 679 (5th Cir. 1969), cert. denied, 398 U.S. 903 (1970). Unfortunately, the procedure in this case was somewhat different. Petitioner Jhirad brought his first petition before the magistrate had held his hearing. Reluctantly, this Court felt constrained to decide the merits of petitioner's claims before the hearing because of the prolonged pendency of the petition.

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Of necessity, this course of events further limited the narrow scope of review of an extradition matter normally open to a court on a petition for habeas corpus,<sup>1/</sup> since no issues regarding the magistrate's decision could be presented in the first petition.

While denying the first petition, this Court held that the Treaty of 1931, 47 Stat. 2122, between Great Britain and the United States, acceded to on behalf of India in 1942, was a valid existing treaty of extradition between India and the United States which supported an exercise of jurisdiction by the magistrate. In addition, it was held that the offense charged against Jhirad came within the offenses enumerated as extraditable in the Treaty. Lastly, this Court held that under the Treaty of 1931, extradition otherwise permissible could not take place if the statute of limitations of India or the United States would bar prosecution of the charged offense. However, the Court rejected petitioner's assertion that either the applicable United States Statute of Limitations, 18 U.S.C. 3282, or the applicable Indian principle of laches would prevent the prosecution of Jhirad.

Jhirad in his present petition raises three major issues which he asserts foreclose extradition. I now turn to a discussion of those issues.

Jhirad strenuously requests that this Court reconsider its original determination that some of the charged

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offenses allegedly committed by Jhirad are not time barred by 18 U.S.C. §3282, the relevant United States Statute of Limitations. Under 18 U.S.C. §3282 there is a five year period of limitation from the time of the alleged offense within which the accused must be indicted. It is uncontested that the Government of India did not institute action against Jhirad until nearly seven years after the last alleged offense. Unless, therefore, the period were tolled, these charges would not support extradition. However, this Court held that under 18 U.S.C. 3290, the time period was tolled on July 26, 1966, when Jhirad left India. 18 U.S.C. §3290, tolls the running of the Statute of Limitations when the alleged offender is a "fugitive from justice". The focus of petitioner's attack is this Court's determination that Jhirad's mere absence from India tolled the statute regardless of his motive or intention.

As was stated in this Court's first decision, the circuits are divided as to the meaning of "fugitive from justice" in Section 3290. One line of cases holds that to constitute a fugitive from justice, it must be shown that one was absent from the jurisdiction where the crime was committed and, in addition, that the fugitive intended to avoid prosecution or evade the jurisdiction of the local courts. Donnell v. United States, 229 F. 2d 560 (5th Cir. 1956); Brouse v.

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United States, 68 F. 2d 294 (1st Cir. 1933); Greene v. United States, 154 F. 401 (5th Cir. 1907), cert. denied, 207 U.S. 596 (1907); Porter v. United States, 91 F. 494 (5th Cir. 1898). The other line of cases holds that the mere absence of the defendant ~~from~~ the jurisdiction is sufficient to constitute a fleeing from justice and thus to toll the Statute of Limitations. King v. United States, 144 F. 2d 729 (8th Cir. 1944), cert. denied, 324 U.S. 854 (1945); McGowan v. United States, 105 F. 2d 791 (D.C. Cir. 1939), cert. denied, 308 U.S. 552 (1939); Green v. United States, 188 F. 2d 43 (D.C. Cir. 1951), cert. denied, 341 U.S. 955 (1951); In re Bruce, 132 F. 390 (D. Md. 1904), aff'd sub nom. Bruce v. Bryan, 136 F. 1022 (4th Cir. 1905). This Court adheres to its earlier decision following the latter line of cases.

It is important to remember the context within which this decision must be made. This is an extradition case, involving activity which has taken place half-way around the world. The extradition procedures afforded by statute seek to preserve an element of judicial surveillance over a procedure which is basically an action of international comity. Of necessity, a fugitive is not given a full trial on the issue of his guilt. In fact, the procedures fall strikingly short of a full trial. It would be most difficult for a court in one jurisdiction to seek to determine factual issues arising in another distant

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jurisdiction. Undoubtedly, this constitutes the rationale for requiring that the demanding country to support extradition merely prove reasonable grounds to believe the fugitive guilty. These same factors persuade this Court that to apply a test requiring a showing of intent, at best a difficult issue of fact, for an act occurring in a distant land, would be most inappropriate.

In seeking to have this Court change its earlier position, petitioner has attempted to demonstrate that Congress desired that an intent to avoid prosecution be proved in order to satisfy the fleeing from justice requirement of Section 3290. The petitioner's argument, quite novel and ingenious, is based on an analysis of the terms "fugitive from justice" and "absent from the district" as used in the Internal Revenue Codes of 1939 and 1954, each of which has its own statute of limitations. The Statute of Limitations, 26 U.S.C. §3748, included within the 1939 Code was tolled when a person committing the alleged offense was absent from the district. When the 1954 Code was enacted, Congress chose to toll its Statute of Limitations, 26 U.S.C. §6531, when the person committing the alleged offense is outside the United States or is a fugitive from justice within the meaning of 18 U.S.C. §3290. Also, at this time, Congress amended the Code of 1939 §3748, to delete<sup>2/</sup> the mere absence standard, substituting the fleeing from justice standard.

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It is argued therefore that Congress clearly distinguished between mere absence and fleeing from justice, and that Congress intended fleeing from justice in the tolling provision, 18 U.S.C. §3290, to require a showing of intent to be operative.<sup>3/</sup> Interesting as this argument is, it is of very little relevancy what Congress meant when it enacted the Internal Revenue Codes, when the issue before the Court is the meaning of a phrase in a different statute, regardless of how similar are the statutory sections.

The general statute of limitations containing the phrase "fugitive from justice" has existed for many years prior to the enactment of the 1954 Code. Congress's intent in 1954 regarding a phrase in one Statute is not of controlling import in determining what the same phrase was intended to mean in a different statute enacted by a Congress more than 60 years before. In addition, a majority of courts faced with divining the meaning of "fugitive from justice" in 18 U.S.C. §3290, and its predecessor statute 18 U.S.C. §583 held that Congress had not required a showing of intent.

Petitioner's argument fails for another reason. Even though the phrase "fugitive from justice" as contained in 26 U.S.C. §6531 may have been interpreted as not being an operative tolling provision unless an intent to flee was proven, it is important to note that the phrase applies only

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to intra United States flights. Under 26 U.S.C. 56531, the time for commencement of a tax action is tolled

"during [the period when] the person committing one of the various offenses . . . is outside the United States or is a fugitive from justice."

In those cases where a defendant in a tax suit has been outside the country during the period following the alleged offense, most courts have held that the time period within which to bring an action is tolled by the mere absence from the country of the accused. U. S. v. Foster, 197 F. Supp. 387 (D.Md. 1961), rev'd on other grounds, 309 F. 2d 8 (4th Cir. 1962); U. S. v. Myerson, 368 F. 2d 393 (2nd Cir. 1966), cert. denied, 386 U.S. 991 (1967); U. S. v. Jurzykowski, 159 F. Supp. 7 (N.D.N.Y. 1957).

Thus, under the tax laws there are two separate standards, one for intra-country absences and another for absences from the country. It should be noted that 53290 applies to both intra- and extra- U. S. flights from justice. It would be highly inconsistent to attempt, as petitioner has sought, to infuse the words "fleeing from justice" in 53290, where they have a broader application, with the meaning that the words have acquired as narrowly used in the tax code, 26 U.S. 56531. This is particularly true in light of the fact that in the

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present case the term "fleeing from justice" must be interpreted in circumstances where the alleged offender has not merely moved from one jurisdiction within a country to another but has, in fact, left his homeland. It is for these reasons that this Court adheres to its earlier opinion that as to the last three charged offenses included in the third charge sheet presented by India to the Magistrate, the applicable statute of limitations has been tolled by §3290.<sup>4/</sup>

The second argument made by Jhirad in his petition is that extradition is being sought by India to punish petitioner for political activity and thus extradition is barred by Article Six of the Treaty of 1931, which is as follows:

"A fugitive criminal shall not be surrendered if the crime or offense in respect of which his surrender is demanded is one of a political character or if he proves that the requisition for his surrender has, in fact, been made with a view to try or punish him for a crime or offense of a political character."

Art. 6, Treaty of 1931, 47 Stat. 2122.

Article Six appears to set forth two separate tests by which to determine whether the person sought for extradition is being properly sought by the demanding country. There was no attempt by petitioner at the hearing before Magistrate Goettel to demonstrate that the offenses charged were political in character, nor has this claim been made in this petition. The Magistrate, though uncertain as to whether, in fact, this

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article mandated that he must weigh evidence on the question of whether India's action against Jhirad was politically motivated, nevertheless heard evidence on the question and held that petitioner had failed to prove such political animus. A fair reading of the Treaty compels the conclusion that this Treaty creates a prohibition against politically motivated extradition, and therefore the Magistrate properly allowed evidence to be presented on this issue.

In Ornelas v. Ruiz, 161 U.S. 502 (1896), the Supreme Court was asked to review a District Court's determination that a magistrate did not have jurisdiction to extradite an accused because the acts allegedly done were political and as such were immunized by the relevant treaty of extradition. In setting down the standard for review of a magistrate's determination, Mr. Chief Justice Fuller, speaking for the Court, indicated that a writ of habeas corpus was not a writ of error and that the District Court could only inquire whether "there was legal evidence on which the magistrate might properly conclude the accused had committed offenses within the Treaty as charged."

The language of Article Six makes it clear that the burden of proof rests on the petitioner to show that India's demand is being made to punish him for political activities. I find that the Magistrate was correct in concluding that petitioner had failed to prove his contention. The only evidence offered by petitioner in support of his argument was

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that Jhirad was an outspoken advocate of the State of Israel, in a country firmly committed to the Arab bloc; that certain Government officials had warned him about his activities; and that he was supposedly under surveillance by some Government agencies. However, this alone is not enough to demonstrate that this request for extradition is motivated by India's animosity for Jhirad's pro-Israel sentiments. Petitioner has shown no evidence regarding the circumstances of this investigation of Jhirad or his indictment in India, which shows political motivations. Indeed, as the Magistrate pointed out in his opinion, negating the inference of strong animosity toward Jhirad is the fact that at the very time he was allegedly chastized and under surveillance for his pro-Israel feelings, he held the highest civilian office in the Indian Navy; he was allowed to attend several World Jewish Conferences (in fact that was his destination on his final departure from India); and he was bestowed with the honor of designation as Senior Advocate by the Indian Bar Association. Petitioner has failed to prove that political motivation lurks behind this demand for extradition. Thus, it is clear that Article Six does not prohibit the extradition of Jhirad for his alleged offenses.

Lastly, I turn to petitioner's contention regarding the evidence produced at the hearing before the Magistrate.

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Under 18 U.S.C. §3184, a magistrate is empowered to conduct a hearing to determine, among other things, whether there is evidence sufficient to sustain the charge under the provisions of the appropriate treaty. Article Nine of the Treaty of 1931 states that

" . . . extradition shall take place only if the evidence be found sufficient, according to the laws of the High Contracting Party applied to, . . . to justify the committal of the prisoner for trial, in case the crime or offense had been committed in the territory of such High Contracting Party . . . "

Mr. Justice Brandeis, in Collins v. Loisel, 259 U.S. 309 (1920), while interpreting an article in an earlier treaty of extradition with Great Britain,<sup>5</sup> different in form but similar in substance to Article Nine, held that the treaty required that the magistrate find evidence sufficient "to block out those elements essential to a conviction." The test to be applied by the magistrate has been variously stated, but all courts in substance make clear that the magistrate does not inquire into the guilt or innocence of the accused, but looks only to see if there is evidence sufficient to show a reasonable ground to believe the accused guilty.

Wacker v. Bisson, 370 F. 2d 552 (5th Cir. 1967), cert. denied,

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387 U.S. 936 (1967). Indeed, it has been said the foreign country need only show probable cause that the fugitive is guilty. Factor v. Laubenheimer, 290 U.S. 276 (1933); Charlton v. Kelly, 229 U.S. 447 (1913).

Before determining whether there was reasonable cause to believe the fugitive is guilty, it is first necessary to determine whether there is reasonable cause to believe a crime was committed. In determining whether a crime was committed, the magistrate apparently assumed that what must be proved were the elements of the crime of embezzlement as defined by the law of New York State. Though the language of Article Nine could be read to indicate that Federal law should be applied, it seems clear that New York law as to embezzlement ought to be the source for these necessary elements.<sup>6/</sup> The magistrate found that there was probable cause that a crime had been committed and that there were reasonable grounds to believe that the petitioner was guilty of that crime.

There is only a limited review of the magistrate's finding of probable cause open to this Court. In a petition for a writ of habeas corpus, Mr. Justice Holmes, speaking for the Supreme Court in Fernandez v. Phillips, 268 U.S. 311 (1925), described the limitations on review in the following way:

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" . . . habeas corpus is available only to inquire . . . whether there was any evidence, warranting the finding that there was reasonable ground to believe the accused guilty." [emphasis added] 263 U.S. at 312.

See also, McNamara v. Henkel, 226 U.S. 520 (1913); Jiminez v. Aristeguieta, 311 F. 2d 547 (5th Cir. 1962), cert. denied, Jiminez v. Hixon, 373 U.S. 914 (1963). The evidence is thoroughly reviewed by Magistrate Goettel in his opinion, and the analysis need not be repeated. I hold that there was evidence as to all the elements material in showing the crime of embezzlement and that there is reasonable ground to believe that the petitioner is guilty of that crime.

The crime of embezzlement under New York law, now included as a form of larceny in §155.05 Penal Law (McKinney 1965) is committed when a person who, having money or property in his possession as attorney, fiduciary, etc., appropriates such money to his own use or the use of other than the lawful owners. See People v. Gibson, 218 N.Y. 70, 112 N.E. 730 (1916). Both sides agree that petitioner was the administrator of the Naval Prize fund from the moment the fund was set up in late 1958 until it was closed in 1962. And the petitioner does not dispute the evidence introduced by India which shows that checks written on the Prize Fund were cashed by Jhirad and deposited in his own account, sometimes in toto and at other times in smaller amounts.

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Jhirad admits that all of the records of the Prize Fund were destroyed without an audit. But he argues that there is no evidence that any rightful claimant to the fund had been deprived. The Magistrate rejected evidence presented by India showing the names of allegedly unpaid claimants to the Fund. Such a determination is within the province of the Magistrate and not subject to review on habeas corpus. Further, this Court agrees with the Magistrate's conclusion that India did not have to show that someone entitled to a share was not paid. The evidence presented to the Magistrate demonstrated that Jhirad appropriated money to his own use over which he maintained only fiduciary control. It is not necessary that an individual unpaid claimant be brought forth, since there was evidence presented which demonstrates that the money was not Jhirad's. If the money did not belong to a claimant, then it must revert back to the authorizing unit, certainly not to the fiduciary who administered it. For probable cause to be shown, it is necessary only that there be evidence that the money was not Jhirad's, rather than, as petitioner has suggested, that there be evidence that the money was the property of a particular person.

Petitioner cites People v. Von Csch, 9 App. Div. 2nd 660, 191 N.Y.S. 2d 699, (1st Dept. N.Y. 1959), for the

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proposition that the mere deposit of money over which one is trustee into one's own bank account is not evidence of the intent necessary for embezzlement. Upon careful examination, the Von Cseh case is seen as merely standing for the proposition that where the fiduciary is expressly given absolute discretion as to the deposit of money, more must be shown to indicate a felonious intent. In this case, there was no evidence that Jhirad was given the discretion to deposit money as he saw fit. Thus, it seems to me that the deposit of money in the bank is sufficient evidence of such an intent to satisfy probable cause.

The Magistrate was hesitant about permitting the petitioner to introduce evidence which allegedly showed that some claimants were paid with money orders purchased by cash which allegedly was advanced by Jhirad. The law is somewhat unclear as to what evidence a fugitive can advance at the hearing. Charlton v. Kelly, supra, 229 U.S. 447 (1913). The Second Circuit in U. S. ex rel Petrushansky v. Marasco, 325 F. 2d 562, (2nd Cir. 1963), cert. denied, 376 U.S. 952 (1964), stated the rule in the following way:

"Although at a hearing of this type a fugitive has a right to introduce evidence, the right is limited to testimony which explains rather than contradicts the demanding country's proof, and its precise scope is largely in the Commissioner's discretion."

325 F. 2d at 567.

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The line between an explanation and a contradiction is a narrow and sometimes invisible one. It appears proper that the Magistrate allowed this evidence to be presented. The evidence as regards Jhirad's justification does serve to explain the deposit of moneys in petitioner's account. Even with this explanatory evidence, however, there is sufficient evidence to show probable cause. As the Magistrate properly pointed out, whatever evidence Jhirad presented to show that the transfer of money from the fund to his account was merely a repayment for funds advanced because of the inconvenience of having to go to the bank to cash Fund checks and then to pay for the postal orders, was negated by the fact that petitioner on many occasions would for several days in a row withdraw large amounts from the Fund and deposit them in the bank, and then make further withdrawals from the bank. It strikes me that these frequent trips to the bank often in the same day represent the height of inconvenience.

The Magistrate may have erred in disregarding the evidence introduced by petitioner that he made a substantial profit in one commodity brokerage account which he kept. However, this exclusion is not of great importance. As the Supreme Court indicated in Charlton v. Kelly, supra, 229 U.S. 447 (1913), the erroneous exclusion of other evidence

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will not render the detention illegal, so long as there remains enough competent evidence to sustain the burden of establishing probable cause. Even accepting petitioner's evidence, the net result of his market activities is a profit which compared to his alleged advances seems minute, and thus not of persuasive force in serving as a source of cash for the alleged advances.

Finally, petitioner seeks to object to the Magistrate's refusal to credit petitioner's evidence that it was not he who ordered the destruction of the records of the Prize Fund. Under the test of Petrushansky, this evidence would seem to be contradictory, not explanatory, and thus I find it properly excluded. It is important to note that the evidence does not have to show guilt, but need only show probable cause or a reasonable belief that the petitioner was guilty of the crime for which extradition is sought. I conclude that there was evidence to support the Magistrate's finding.

For the above reasons, the petition for the writ of habeas corpus is denied.

SO ORDERED.

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U. S. D. J.

Dated: New York, New York

June 8, 1973.

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FOOTNOTES

1/ The scope of inquiry open to a district court when deciding a writ of habeas corpus in an extradition case is very narrow, being limited to the following questions:

- 1) Whether the magistrate has jurisdiction;
- 2) Whether the offense alleged is a treaty offense, and
- 3) Whether there was substantial evidence produced at the hearing to support the magistrate's determination that there were reasonable grounds to believe the accused guilty of the alleged offense.

Wacker v. Bissen, 348 F. 2d 602 (5th Cir. 1965);  
Sayne v. Shipley, 418 F. 2d 679 (5th Cir. 1909),  
cert. denied, 398 U.S. 903 (1970);  
U. S. ex rel Petrushansky v. Marasco, 215 F. Supp. 953 (S.D.N.Y. 1963), aff'd 325 F. 2d 562 (2nd Cir. 1963)  
cert. denied, 376 U.S. 952 (1964).

2/ The "absent from the district" standard was in fact not totally deleted but after 1954 was to apply only in prosecutions of alleged violations of the 1939 Code occurring prior to 1954.

3/ At least one court has suggested that the difference in the language of the tolling provision in the 1939 and 1954 Internal Revenue Codes resulted from an enlargement of the scope of federal criminal jurisdiction from districtwide to nationwide. United States v. Foster, 197 F. Supp. 387 (D.Md. 1961).

4/ Dealing with the other charge on the last sheet, the Magistrate held in his decision, relying on §222 of the Indian Penal Code, that the Statute of Limitations had not run as to the last four charged offenses since they constituted one inclusive offense whose last act occurred less than five years before Jhirad left India. This analysis is not without some merit. However, this Court, relying on the testimony of Mr. Mehta, an expert on Indian law, called by the Government of India at the hearing, feels constrained to hold that the four offenses do not constitute one

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FOOTNOTES - continued.

4/ (cont.)

offense nor have they been treated as one offense within the meaning of the statute, but must be dealt with individually. Thus, only the last three charged offenses are not time barred.

5/

The Treaty of 1931, 66 Stat. 2122, originally was made between the United States and Great Britain, and it included a provision which allowed Great Britain to accede to the Treaty on behalf of certain designated territories then under British control. The Treaty was acceded to on behalf of India in 1942, and was found to support jurisdiction here in Jhirad v. Ferrandina, 355 F. Supp. 1155 (S.D.N.Y. 1973).

6/

The Second Circuit in Shapiro v. Ferrandina, Slip Op. 702, (2nd Cir. April 6, 1973), held that a clause in another extradition treaty similar in content to Article Nine referred to state law to define the elements of the charged crime for the purpose of seeing if a *prima facie* case was made out. See also Wright v. Henkel, 190 U.S. 40 (1903); see also Pettit v. Walsh, 194 U.S. 205 (1904).

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UNITED STATES COURT OF APPEALS  
Second Circuit



At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the **nineteenth** day of **June**, one thousand nine hundred and **seventy-three**.

Elijah Ephraim Jhirad,  
Petitioner-Appellant,

4

Thomas E. Ferrandina, United States  
Marshal, Southern District of New York,

Respondent-Appellee.

upon consideration of  
It is hereby ordered that the motion made herein by counsel for the

**appellant**

suppellee.

~~petitioner~~

સાધુબદ્ધિ

by notice of motion dated June 13, 1973, for a stay pending appeal that the motion for a stay

be and it hereby is granted ~~xxxxxx~~ denied pending argument of the appeal.

It is further ordered that the application by the Government of India for revocation of bail be and it hereby is denied.

India for revocation of bail be and it is hereby ordered that record in the second writ of Habeas Corpus further ordered that filed on or before June 26, 1973; that the appellant shall file his brief and joint appendix on or before July 3, 1973; that the appellee shall file its brief on or before July 12, 1973; that the argument of the appeal shall be set during the week of July 16, 1973, and that all parties may file their brief and papers in typewritten form.

A. DANIEL FUSAEO  
Clerk

by Edward J. Guardaro  
Senior Deputy Clerk

BEFORE: HON. HENRY J. FRIENDLY

REV. WILFRED KENNEDY

~~WALTER E. MANSFIELD~~ Circuit Judges

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United States Court of Appeals

for the Second Circuit

Nos. 1113-1114 - September Term 1972

(Argued July 20, 1973)

Decided October 24, 1973)

Docket Nos. 73-1126  
73-1924

Elijah Ephraim Jhirad,

Appellant,

v.

Thomas E. Ferrandina, United States Marshal,  
Southern District of New York,

Appellee.

Before: Hays and Oakes, C.J.J., and Tyler, D.J.

Appeal from a judgment of the United States  
District Court for the Southern District of New York, Kevin  
T. Duffy, Judge, denying two applications for writs of  
habeas corpus.

Reversed and remanded.

Edward L. Sadowsky, New York,  
New York (Tenzer, Greenblatt,  
Fallon & Kaplan, on the brief),  
for Appellant,

Louis Steinberg, New York,  
New York (Edwin A. Steinberg,  
on the brief), for the Govern-  
ment of India,

\* Of the United States District Court for the  
Southern District of New York, sitting by designation.

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William R. Bronner, New York,  
New York (Christopher Roosevelt,  
Assistant United States Attorney  
on the brief), for Appellee.

Hays, Circuit Judge:

This is a consolidated appeal from two orders of the United States District Court for the Southern District of New York denying the appellant's petitions for writs of habeas corpus in an international extradition proceeding. On the request of the government of India, the appellant, the former Judge Advocate General of the Indian Navy, was arrested on the charge that he embezzled a portion of a Naval Prize Fund with the administration of which he had been entrusted. The government of India sought extradition under a treaty made in 1931 between the United States and Great Britain at a time when India was a dominion of Great Britain. The treaty was applied by Great Britain to India in 1942. In 1950 India achieved independence. Somewhat later, in 1967, the validity of the treaty as a treaty between the United States and India was confirmed by an exchange of notes between the State Department of the United States and the government of India.

Initially, the complaint against the appellant alleged 52 separate embezzlements of the Naval Prize Fund. The Naval Prize Fund was derived from a grant by Great Britain of a portion of the proceeds of naval prizes of war captured in World War II. The Fund was to be distributed to the officers and men qualified for such distribution

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by reason of having served at sea for a certain amount of time during the war. In 1958 Great Britain transferred the sum of 1,973,679 rupees to the Indian Navy for distribution. The Fund thus established was to be administered by three Naval officials, including the appellant. The charges brought by the Indian Government against the appellant alleged that he had withdrawn cash from the Fund and deposited it in his personal account. The charges alleged that the acts of embezzlement took place between 1959 and 1961. The Fund was exhausted in December, 1961. The appellant continued in his office as Judge Advocate General of the Indian Navy until 1964. From 1964 until 1966 the appellant remained in India receiving half pay and residing in a home furnished by the Indian Government. In July, 1966 the appellant left India, residing first in Switzerland, then in Israel, and finally arriving in the United States where he was granted a permanent resident visa. The charges against him were not brought until 1968, two years after he left India, and well over five years from the date of the last alleged act of embezzlement (September 27, 1961).

The period of time which elapsed between the date of the alleged offenses and the prosecution of charges by the government of India gives rise to the major legal challenge raised by the appellant on this appeal. Appellant contends that extradition is barred by the statute of limitations. For non-capital offenses, 18 U.S.C. § 3282 establishes a

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1

five year statute of limitations. More than five years passed before the charges were brought by the government of India. However, 18 U.S.C. § 3290 provides that the statute of limitations "shall [not] extend to any person fleeing from justice." The district court found that 49 of the 52 charges brought against the appellant were barred by the statute of limitations, since with respect to them five years passed while the appellant remained in India. However, for the last three counts, the district court found that although five years had passed,<sup>2</sup> the statute was tolled under the provisions of 18 U.S.C. § 3290 because the appellant had fled from justice. In making this finding, the district court held that mere absence from India was sufficient to constitute "fleeing from justice" within the meaning of 18 U.S.C. § 3290. The appellant contests this construction, arguing that an intent to flee to avoid prosecution must be shown before the statute of limitations is tolled.

Since we are persuaded that the extradition treaty under which the government of India is attempting to extradite the appellant is valid as between the United States and the Republic of India,<sup>3</sup> we must decide whether the district court was correct in interpreting the phrase "fleeing from justice" so as to include a situation in which no intention to flee to avoid prosecution was proved.

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Section 3290 of Title 18 of the United States

Code provides simply that:

"No statute of limitations shall extend to any person fleeing from justice."

The appellant contends that the phrase "fleeing from justice" means that the government must prove that the individual left the place where the offense occurred with the intention of avoiding arrest or prosecution. The district court rejected this construction, finding that mere absence from the place of the offense would suffice to prove "fleeing from justice."

There is a direct conflict among the Circuits on the point in issue. The Fifth Circuit has clearly held that mere absence is not sufficient to show "fleeing from justice" and flight with intent to avoid arrest or prosecution must be proved. In Donnell v. United States, 229 F.2d 560, 565 (5th Cir. 1956), the court held that:

". . . in determining whether a person charged with crime will be denied the right to be protected by the statute of limitations, the purpose and intent of his absence is an important matter to be inquired into under the plain words of the statute and the decisions discussed."

The court based its conclusion on "the plain wording of the statute" and on the Supreme Court ruling in Streep v. United States, 160 U.S. 128 (1895). In Streep the Court did not rule directly on the point presented in Donnell and in the case before this court. However, the Fifth Circuit in Donnell found that:

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"[i]n affirming, the Supreme Court held that it was unnecessary that a person have in mind avoiding the justice of any particular court in order to be a fugitive within the meaning of the statute. Nevertheless, it was clearly recognized that the general intention of the defendant in leaving the jurisdiction is material and is an indispensable aspect in considering whether he was, while outside the jurisdiction, a fugitive from justice." 229 F.2d at 562.

The Fifth Circuit had reached a similar conclusion concerning the construction of the phrase "fleeing from justice" in two previous cases, Porter v. United States, 91 F. 494 (1898) and Greene v. United States, 154 F. 401 (5th Cir.), cert. denied, 207 U.S. 596 (1907).

The First Circuit adopted the same position in Brouse v. United States, 68 F.2d 294 (1st Cir. 1933),

stating:

"[t]he essential characteristic of fleeing from justice is leaving one's residence, or usual place of abode or resort, or concealing one's self, with the intent to avoid punishment." Id. at 295 (emphasis added).

On the other hand, the Eighth and the District of Columbia Circuits have construed the phrase "fleeing from justice" differently, holding that mere absence from the place of the offense is sufficient to toll the statute. See King v. United States, 144 F.2d 729 (8th Cir.), cert. denied, 324 U.S. 854 (1944); McGowen v. United States, 105 F.2d 791 (D.C. Cir.), cert. denied, 308 U.S. 552 (1939).

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This court has never directly passed on the issue. We now hold on the basis of the plain language and the purpose of Section 3290 that the government must show an intent to flee from prosecution or arrest before the statute of limitations is tolled. As the court noted in Donnell, supra, the phrase "fleeing from justice" carries a common sense connotation that only those persons shall be denied the benefit of the statute of limitations who have absented themselves from the jurisdiction of the crime with the intent of escaping prosecution. It does not appear to us to be unreasonable to provide for tolling of the statute of limitations when a person leaves the place of his alleged offense to avoid prosecution or arrest and for not tolling the statute when a person without such purpose of escaping punishment merely moves openly to another place of residence.

We think that the language of the Supreme Court in Streep v. United States, supra, supports this construction as the court pointed out in Donnell, 229 F.2d at 562-3.

Since the district court found that mere absence was enough to toll the statute of limitations, it did not make a finding on the intent of the appellant in leaving India. We are asked by both sides to rule on the basis of the evidence submitted below on whether the appellant fled from India with the intent to avoid prosecution.

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though the parties themselves reach opposite conclusions on the issue. We decline to make such a determination and, while reversing the decision, remand the case to the district court to make ~~this~~ findings on the issue of intent.

Reversed and remanded.

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FOOTNOTES

1. 18 U.S.C. § 3282 (1970) provides:

"Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years after such offense shall have been committed."

2. According to the appellant's brief, the appellant left India on July 26, 1966. The statute of limitations on the last three counts would have expired on August 29, September 26 and September 27, 1966.

3. As the district court noted, the position of the Executive Branch, the actions of both governments, and the historical continuity between British India and the Republic of India support the continued validity of the treaty. Jhirad v. Ferrandina, 355 F. Supp. 1155, 1159-61 (S.D.N.Y. 1973).

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Fifth Opinion

✓  
FILED  
U.S. DISTRICT COURT

JAN 30 4 30 PM '74  
S.D. OF N.Y.

(W.A.)

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

ELIJAH EPHRAIM JHIRAD,

Petitioner,

-against-

THOMAS E. FERRANDINA, UNITED STATES  
MARSHAL, SOUTHERN DISTRICT OF  
NEW YORK,

Respondent.

: FF40304  
: OPINION AND ORDER  
: 72 Civ. 4026  
: 73 Civ. 1630  
: M. GOETTEL  
: JAN 31 1974

APPEARANCES:

TENZER, GREENBLATT, FALLON & KAPLAN, ESQS.

Attorneys for Petitioner

By: Edward L. Sadowsky, Esq.  
Of Counsel

EDWIN A. STEINBERG, ESQ.

LOUIS STEINBERG, ESQ.

Attorneys for Government of India.

KEVIN THOMAS DUFFY, D.J.

The pending order to show cause presents but another development in this international extradition case by which the government of India seeks the return of petitioner Jhirad to stand trial on the charge of embezzling a portion of a Naval Prize Fund which he had previously administered. After a Section 3184 hearing, Magistrate Goettel

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found that there was probable cause for the requested extradition. However, the petitioner asked this Court to prevent the extradition on the basis that the applicable five year statute of limitations had run. Holding that the statute was tolled by mere absence from the jurisdiction, regardless of the petitioner's intent in leaving, I denied two writs of habeas corpus. The tolling question was one of first impression in this Circuit, and on appeal the Court reversed, holding that intent to flee from justice must be found in order to toll the statute. The case was therefore remanded so that findings of fact could be made as to Jhirad's "intent" at the time he left India.

Thus the matter was once again before Magistrate Goettel, who had handled the original hearing so expertly, for a further development of the intent question. In a letter dated January 7, 1974, the Magistrate informed the parties that witnesses from India would be available on January 29, 1974, and advised the parties to be present on that date for a continuation of the proceedings. Upon receipt of that letter and another letter of the same date from the attorneys for the government of India, counsel for Jhirad brought an order to show cause seeking to bar the taking of any further evidence in this case or, in the alternative, seeking additional discovery. I signed the order

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to show cause on January 17, 1974, and held a hearing on January 24, 1974.

Petitioner's first contention is that "the District Court has no power to take additional evidence under the mandate from the Court of Appeals." Affidavit of Edward L. Sadowsky, p. 3. In remanding, the Court of Appeals stated:

"We are asked by both sides to rule on the basis of the evidence submitted below on whether the appellant fled from India with the intent to avoid prosecution, though the parties themselves reach opposite conclusions on the issue. We decline to make such a determination and, while reversing the decision, remand the case to the District Court to make findings on the issue of intent."

Jhirad v. Ferrandina, (2d Cir., October 24, 1973) 73 Civ. 5515, 5521. Petitioner interprets the absence of any reference to the taking of further evidence as a direction by the Court of Appeals that no further evidence is to be taken. I disagree. The fact that the Court remanded the case without explicitly addressing itself to the need for taking additional evidence does not constitute a prohibition against taking such evidence. In declining to decide the factual

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issue of intent, the Court noted that "the parties themselves reach opposite conclusions on the issue." Id. at 5521. Had the Court seen no need for additional evidence, there would have been no purpose in declining to make the determination itself or in remanding the case to the District Court.

Furthermore, such law as may be found in the area of extradition also favors the taking of additional evidence. Unfortunately, as the Second Circuit has aptly stated, "Neither statutes nor decided cases furnish satisfactory guides as to procedures for obtaining proof upon extradition proceedings." First Nat'l City Bank v. Aristeguieta, 287 F.2d 219, 222 (2d Cir. 1960), vacated as moot, 375 U.S. 49 (1963). Though "satisfactory guides" in this area may be sparse, the Fifth Circuit has ruled that: "Unique rules of 'wide latitude' govern the reception of evidence in Section 3184 hearings." Sayne v. Shipley, 418 F.2d 679, 685 (5th Cir. 1969), cert. denied, 398 U.S. 903 (1970) (citations omitted). Thus, under the "wide latitude" standard I find that further evidence can be taken in this case and I deny the request to bar its admission.\*

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\* Petitioner's claim that the taking of further evidence would be an "intolerable burden" is without merit. Remands often necessitate a complete retrial of the issues and while this is admittedly "burdensome", it is neither "intolerable" nor unreasonable.

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Petitioner's alternative request is for further discovery and he lists eight items or admissions which he believes he is entitled to discover. Affidavit of Edward L. Sadowsky, pp. 6-7, par. 18. These requests are very comprehensive; for example, the third item asks for "[i]nspection of the petitioner's personnel file with the Indian navy."

I find that the granting of these discovery requests would clearly extend the scope of an extradition hearing well beyond its intended and limited purpose and would be an unwarranted excursion into the jurisdiction and province of the requesting country. Petitioner's requests for discovery must be seen as an attempt to have the entire case tried here and, as the Supreme Court has stated, "[t]he function of the committing magistrate is to determine whether there is competent evidence to justify holding the accused to await trial, and not to determine whether the evidence is sufficient to justify a conviction." Collins v. Loisel, 259 U.S., 309, 316 (1922) (emphasis added). See also Crin v. Shine, 187 U.S. 181, 197 (1902); Benson v. McMahon, 127 U.S. 457, 461-62 (1888).

Lower federal courts have also traditionally warned against allowing too extended discovery in extradition proceedings for fear that the hearing would be transformed into

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a full trial of the merits. As early as 1883 this District Court realized that:

"If this were recognized as the legal right of the accused in extradition proceedings, it would give him the option of insisting upon a full hearing and trial of his case here; and that might compel the demanding government to produce all its evidence here, both direct and rebutting, in order to meet the defense thus gathered from every quarter. The result would be that the foreign government, though entitled by the terms of the treaty to the extradition of the accused for the purpose of a trial where the crime was committed, would be compelled to go into a full trial on the merits in a foreign country, under all the disadvantages of such a situation, and could not obtain extradition until after it had procured a conviction of the accused upon a full and substantial trial here. This would be in plain contravention of the intent and meaning of the extradition treaties, which are designed to secure a trial in the country where the crime was committed, through the extradition of the accused, upon sufficient proof, according to our law, to justify a commitment here."

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In re Extradition of Wadge, 15 F. 864, 866 (S.D.N.Y. 1883), cited with approval in Collins v. Loisel, 259 U.S. 309, 316 (1922) and Charlton v. Kelly, 229 U.S. 447, 461 (1913).

In 1963, the Second Circuit reiterated this conservative approach holding that "[a]lthough at a hearing of this type, the fugitive has a right to introduce evidence, the right is limited to testimony which explains rather than contradicts the demanding country's proof, and its precise scope is largely in the Commissioner's discretion."

United States ex rel Petrushansky v. Marasco, 325 F.2d 562, 567 (2d Cir. 1963).

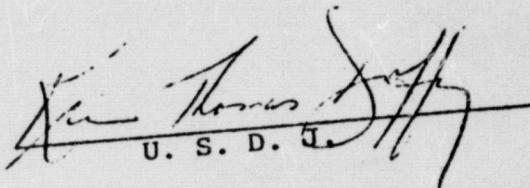
From the cases cited above it is clear that under the traditional extradition standards discovery is limited and discretionary and under such a standard I would deny the petitioner's broad requests for discovery. If extradition is found to be warranted, petitioner will have ample opportunity in India to defend against the charges.

The petitioner has not, however, based his present request for this additional discovery on the traditional standards applicable in an extradition hearing but instead he argues that the procedural rules and guidelines of federal habeas corpus should be employed in the hearing before Magistrate Goettel.

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Petitioner argues that the only issue to be decided is intent which "arises as a disputed issue of fact in a habeas corpus proceeding which tests the jurisdiction of the Court to order extradition, and the trial of that issue must be governed by procedures which obtain in habeas corpus." Affidavit of Edward L. Sadowsky, p. 5, par. 12. There is no case law or statute cited in support of this shift from an extradition hearing standard to a habeas corpus standard and, while the argument may be somewhat novel and interesting, I find no legal basis to support it. The hearing before Magistrate Goettel is an extradition hearing which has been remanded for further development of the intent question. Habeas corpus is merely the method of obtaining a limited review of the extradition hearing since there is no appeal from the extradition hearing itself. Fernandez v. Philips, 268 U.S. 311 (1925). Thus, the traditional extradition standards discussed above are controlling and the petitioner's request for further discovery is denied.

SO ORDERED.



U. S. D. J.

Dated: New York, New York  
January 26, 1974.

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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

Sixth Opinion

-----X-----  
In the Matter of the Extradition of : MAG. DKT. # 72MCA1214  
ELIJAH EPHRAIM JHIRAD : 73 Civ. 1630 (KTD)  
Fugitive from the Justice of the : ADDITIONAL FINDINGS ON  
Government of India : EXTRADITION PROCEEDINGS  
-----X-----

GOETTEL, U.S. Magistrate

Following an extradition hearing requested by the Government of India, I found, in an opinion dated April 12, 1973, that there was probable cause to sustain the charges and, therefore, directed that the respondent\*, Elijah Jhirad, be extradited to India. The crime charged by the Government of India was embezzlement of a portion of a Naval Prize Fund as to which Jhirad, then Judge Advocate of the Indian Navy, had been the administrator between 1959 and 1961.

One of the defenses asserted by Jhirad was that the time limit for extraditions authorized by the treaty had expired. Article 5 of the Treaty of 1931 between the United States and India provides that extradition cannot take place if the passage of time has caused an exemption from prosecution under the laws of either party. The United States statute of

\* Jhirad is both the respondent in this proceeding and the petitioner in the other proceedings mentioned herein. To avoid confusion, he will be referred to by his name hereafter.

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limitations is five years (18 U.S.C. 3283). (Indian has no statute and considers delays in prosecution at the conclusion of the case in the overall consideration of guilt or innocence, if prejudice can be shown.) The final incidents of the embezzlement charged occurred in July and September of 1961. The charges against Jhirad were not brought until 1968, some seven years after the last of the offenses charged. However, he had left India on July 26, 1966 and has never returned.

Before the extradition hearing was held, Jhirad had brought on a petition for habeas corpus seeking to bar the extradition proceedings on several grounds, one of which was the statute of limitations defense. The crucial question was whether the simple absence of Jhirad from India tolled the statute of limitations, or whether it was necessary for tolling to prove that he left India to avoid prosecution. In a Memorandum and Order dated January 23, 1973, Judge Duffy ruled that Jhirad tolled the statute by his mere absence from India commencing in July of 1966, and indicated his reluctance to attempt to determine factual issues concerning events which occurred in another country many years ago,

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particularly when dealing with an embezzlement type offense which can go undiscovered for long periods, thus delaying prosecution and inviting a time bar.

Because of the ruling of Judge Duffy on the first habeas corpus petition, the extradition hearing did not require the presentation of any evidence concerning Jhirad's motives and intent on leaving India although, collaterally, some such evidence was adduced. Following this Court's finding that Jhirad was extraditable, a second writ of habeas corpus was sought from Judge Duffy. Several new objections to extradition were asserted and Jhirad sought to have Judge Duffy reconsider his earlier ruling with respect to the tolling of the statute of limitations. Judge Duffy, after reviewing the existing law, adhered to his earlier ruling, making the following observations:

"It is important to remember the context within which this decision must be made. This is an extradition case, involving activity which has taken place half-way around the world. The extradition procedures afforded by statute seek to preserve an element of judicial surveillance over a procedure which is basically an action of international comity. Of necessity, a fugitive is not given a full trial on the issue of his guilt. In fact,

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the procedures fall strikingly short of a full trial. It would be most difficult for a court in one jurisdiction to seek to determine factual issues arising in another distant jurisdiction. Undoubtedly, this constitutes the rationale for requiring that the demanding country to support extradition merely prove reasonable grounds to believe the fugitive guilty. These same factors persuade this Court that to apply a test requiring a showing of intent, at best a difficult issue of fact, for an act occurring in a distant land, would be most inappropriate."

Jhirad then took consolidated appeals to the Second Circuit from both of the petitions for writs of habeas corpus. In its decision dated October 24, 1973, Jhirad v. Ferrandina, 486 F.2d 442 (2d Cir.), the Court of Appeals reversed Judge Duffy in an opinion of first impression in this Circuit, holding that the extraditing government must show an intent to flee from prosecution or arrest in order to toll the statute of limitations. Although asked by both sides to determine on the basis of the evidence in the record whether there was such an intent, the appeals court declined to do so and remanded the case to District Court to make findings on the issue.

Judge Duffy then referred the case to me to make findings and to hold additional hearings if necessary. Jhirad

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again moved by order to show cause before Judge Duffy to prevent the taking of additional evidence and for other relief. The motion was denied by Judge Duffy in an opinion and order of January 30, 1974. A further hearing was held on January 30, 1974, before the undersigned.

Jhirad argues that a Magistrate has no power to determine this issue since it allegedly relates to jurisdiction. Magistrates are authorized to issue certifications to the Secretary of State after conducting an extradition hearing if "he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty..." 18 U.S.C. §3184. An exemption from prosecution by lapse of time is a matter of defense to be considered at trial unless specified in the treaty as a contingency for declining extradition. Hatfield v. Guay, 87 F.2d 358 ( 1st Cir. 1937). Article 5 of the extradition treaty states that "the extradition shall not take place if...exemption from prosecution or judgment has been acquired by lapse of time, according to the laws of [either country]". Consequently, it would appear that whether prosecution of an offense is time barred is a matter to be determined under the treaty and is properly

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considered by the Magistrate at the extradition hearing. Moreover, this issue was before Judge Duffy in the motion denied on January 30, 1974, foreclosing further consideration here. In any event, Jhirad has not been reluctant about filing petitions for habeas corpus, and it can be assumed that, if he is unsatisfied with this opinion, he will file still another, thereby getting the District Court's adjudication that he seeks.

Jhirad objected to the evidence offered by the Government of India at the hearing on the grounds that it was not properly authenticated under the provisions of 18 U.S.C. 3190. At the hearing the evidence offered was under consular seal, but the supporting certificate was not the type which authenticated documents "so as to entitle them to be received for similar purposes by the tribunals of the foreign country from which the accused party shall have escaped" 18 U.S.C. §3190. Consequently, the hearing was held open to enable India to introduce the evidence with proper authentications. India's counsel submitted additional copies of the documents with certificates in the proper form. However, Jhirad now objects that the authentications were improper because they

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were not executed by "the principal diplomatic or consular officer of the United States resident in such foreign country", as also required by 18 U.S.C. §3190.

The certificates first submitted bore the signature of the ambassador or consul of the United States. The supplemental corrected certificates (15 in number) are all but one signed by the "Charge d' Affaires, ad interim". (One certificate was executed by United States Ambassador Moynihan.) Jhirad argues that the Court can take judicial notice of the fact that Ambassador Moynihan is the principal American diplomatic official in India, that he is in residence there, and, consequently, the Charge d' Affaires was not authorized to execute the certificates. The defect in this argument is that Ambassadors are not continually in residence in the country to which they are assigned and often return to their native country or travel abroad. The 14 certificates authenticated by the Charge d' Affaires are all dated February 13, 1974. The one signed by Ambassador Moynihan is dated February 23, 1974. This, and the "ad interim" designation of the Charge d' Affaires, suggests that the Ambassador was not "in residence" on the thirteenth of February and that the signer was the principal diplomatic or consular officer on the date in question.

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In Re Herres, 33 F. 165 (8th Cir. 1887); In Re Orpen, 86 F. 760 (9th Cir. 1898). In the absence of other proof, the assumption of regularity of official acts is sufficient to support the admissibility of the documents. Wong Wing Foo v. McGrath, 196 F.2d 120 (9th Cir. 1952).

Another argument made by Jhirad is that the documents should not be admissible since this hearing concerns a jurisdictional questions and should be governed by the standards set down in 28 U.S.C. 2246 for a habeas corpus proceeding. This is essentially the same argument as that concerning the jurisdiction of the Magistrate which was rejected above.

We turn now to the issue of the intention of Jhirad in leaving India, as directed by the Court of Appeals. It appears that the appellate court was not cognizant of all the facts involving Jhirad's departure from India since its opinion merely recites, "In July of 1966 the appellant left India, residing first in Switzerland, then in Israel, and finally arriving in the United States where he was granted a permanent resident visa". The complete chronology of the events is as follows:

February 19, 1966 -- The Central Bureau of Investigation in India was requested to commence an investigation concerning

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allegations that there had been mismanagement, and possibly embezzlement, from the Naval Prize Fund.

May, 1966 -- Jhirad informed a naval officer who had been directed to conduct an inquiry that the records of the Prize Fund had been destroyed (Jhirad had informed his superiors of this fact in the later part of 1965).\*

May 26, 1966 -- A subpoena duces tecum was issued to the Central Bank of India where the Naval Prize Fund had been maintained and where Jhirad had a personal account.\*\*

June, 1966 -- An employee of the Central Bank of India advised Jhirad that the subpoena had been received.\*

June 17, 1966 -- The Secretary General of the World Jewish Congress invited Jhirad to attend the Fifth Plenary Assembly in Brussels, July 31 to August 9, 1966. Subsequently, after being designated by the Central Jewish Board of Bombay as one of the representatives of Indian Jewery, the Congress agreed to defray his costs. (A week later his wife was invited to an auxiliary conference of Women's Zionist Organization held at the same time and place.)

June 28 to July 16, 1966 -- Jhirad and his wife sold various of his law books and other items of his personal possessions.

July 2, 1966 -- The case was officially registered with the Central Bureau of Investigation.

July 3, 1966 -- Jhirad obtained his passport.

July 5, 1966 -- The police began their investigation.

\* Jhirad denied that these events occurred.

\*\*The subpoena was issued under a criminal file number of an earlier and apparently dormant investigation concerning Jhirad's misuse of his business telephone and his having made extensive speculative investments.

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July 16 to July 22, 1966 - Jhirad obtained visas to visit Belgum, France and Switzerland.

July 19, 1966 -- Jhirad obtained permission from his naval superiors to go to Brussels to attend the World Jewish Congress meeting.

July 26, 1966 -- Jhirad left India with his wife and children to attend the World Jewish Congress meeting. (He stopped en route for a few days in Switzerland.)

July 30 - August 10, 1966 -- Jhirad and his wife and family were in Brussels attending the World Jewish Conference.

August 10, 1966 -- Jhirad and his family traveled to Geneva and resided there openly until 1967, when they emigrated to Israel.

Jhirad maintains that he left India for the sole purpose of attending the World Jewish Conference in Brussels, which he had attended a number of times in the preceding years, and taking a vacation thereafter in Switzerland. He contends that he was unaware of the existence of the investigation and that he did not make a final determination not to return to India until November or December of 1966. He points out that, although he did withdraw some of his funds from banks in India and did sell certain of his possessions, he left behind much of his furniture and other possessions, as well as \$10,000 in one bank account. He claims that his

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decision not to return to India was made not because he feared prosecution but because of a hostile attitude toward him which he believed he had observed in the Indian Government. Indeed, it is Jhirad's contention that he was unaware of the criminal prosecution until he was arrested in this country in 1972.

We are not, of course, compelled to accept Jhirad's explanation for his actions. To determine his intention in leaving India we must consider all of the evidence. Jhirad argues, however, that the Government of India, in order to toll the limitations period, is required to prove that he left India with intent to avoid prosecution beyond a reasonable doubt. This argument is based upon the fact that, although a finding of probable cause is all that is necessary in order to find grounds for extraditing Jhirad, the question of whether extradition is time barred under the treaty is an issue for determination only in this Court and, therefore, subject to the burden of proof of a criminal prosecution. Admittedly, this is not an issue which will be ultimately considered in India (except to the extent that, if prejudice can be shown, it may be considered in evaluating guilt). Moreover, if this were a domestic prosecution the burden would

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be on the government to establish beyond a reasonable doubt that the statute of limitations was tolled. People v. Kohut, 30 N.Y.2d 183, 331 N.Y.S.2d 416, 282 N.E.2d 312 (1972).

While this argument is interesting and has a superficial attraction, no authority has been cited to support it. If, in fact, India must prove, beyond a reasonable doubt, flight to avoid prosecution before the expiration of the period of limitations, then it is clear that India has failed in that regard. However, because of the considerations cited in Judge Duffy's opinion quoted above, I do not accept that as being the applicable standard, and I pass on to a finding of the facts on the basis of the preponderance of the evidence.

On all the evidence, I conclude that Jhirad left India for the primary and immediate purpose of attending a World Jewish Conference in Brussels. However, I find that he was aware of the pending investigation, was concerned about it, and considered the possibility that he would not return to India even before he left for Brussels. The trip to Brussels, followed by the vacation in Switzerland, was an opportune time for Jhirad to leave India without creating any undue suspicion, to reappraise his situation when out of

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India without immediately committing himself to a course of action, and to defer making a decision on returning to India until necessary.\*

It can be argued that, since he did not leave India for the immediate purpose of avoiding prosecution, the statute of limitations was never tolled. This appears to be too simplistic an approach. If he did not return to India, when he otherwise would have, so as to avoid prosecution, that would be a constructive flight. The problem is in determining when that occurred.

Although Jhirad contends that he did not make his decision not to return until November or December of 1966 (and then for different reasons), it appears likely that the decision was made somewhat earlier. Jhirad was in the active practice of law in India when he left. He had his cases adjourned until after the middle of October (according to his testimony). He sold one of his air conditions to an acquaintance, since he was going to be away during the hot summer months. Previously when he had taken vacations following his trips to World Jewish

\* Neither party offered any evidence whatever as to when, and for what periods, Jhirad had made living arrangements in Switzerland.

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Conferences, he had stayed only a week to a month. I conclude, therefore, that when he stayed on in Geneva into the fall of 1966, he had made his decision not to return to resume his law practice. Unfortunately, the exact time is extremely critical. The time for prosecution of the last two offenses would have expired in the latter part of September (September 25 and September 27).

Of course, it can be argued that the exact date of decision is not important; that if, while away from his home land, he forms an intention not to return to avoid prosecution the constructive flight can be said to have commenced when he first left. However, no authority has been cited, nor has any been uncovered by independent research, indicating that this is an acceptable concept. (For that matter, no cases have been uncovered dealing with a situation even remotely resembling this.) Indeed, to apply the requirements of the Second Circuit's opinion to the facts of this case indicates the validity of Judge Duffy's doubts that this is a matter appropriate for determination by this Court at this time. However, we are left with no alternative but to make a finding with respect to Jhirad's intent.

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I find it more likely than not that, although he did not leave India to avoid prosecution, while away he decided not to return to India, since he feared being prosecuted. Although it is a difficult determination, I find this decision was made in the middle of September, 1966, and before the 25th and 27th days of that month. Consequently, I am again prepared to certify to the Secretary of State the findings, evidence, exhibits, and transcripts in this matter for appropriate action in extraditing Jhirad to India. However, since it is clear that Jhirad will again seek a writ of habeas corpus, and since there are admittedly very difficult questions involved in this opinion, the remanding of Jhirad to the custody of the Attorney General will be stayed for a period of ten days to allow him to petition for a writ of habeas corpus.

SO ORDERED:

*Gerard L. Goettel*  
United States Magistrate

DATED: New York, N.Y.  
April 26, 1974

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Seventh Opinion

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

ELIJAH EPHRAIM JHIRAD,

Petitioner,

OPINION AND ORDER

-against-

73 Civ. 1630

THOMAS E. FERRANDINA, United States  
Marshal, Southern District of  
New York,

Respondent.

APPEARANCES:

TENZER, GREENBLATT, FALLON & KAPLAN, ESQS.

Attorneys for Petitioner

By: Edward L. Sadowsky, Esq.

Of Counsel

LOUIS STEINBERG, ESQ.

EDWIN A. STEINBERG, ESQ.

Attorneys for the Government of India

HONORABLE PAUL J. CURRAN

United States Attorney

Attorney for Respondent

By: William R. Bronner, Esq.

Assistant United States Attorney

Of Counsel

KEVIN THOMAS DUFFY, D.J.

This is the third petition for a writ of habeas  
corpus brought in this international extradition proceeding.

See 355 F. Supp. 1155 (S.D.N.Y. 1973) & 362-F. Supp. 1057

(S.D.N.Y. 1973), rev'd & remanded, 486 F.2d 442 (2d Cir. 1973).

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The remand from the Court of Appeals was occasioned by a different definition of the term "fleeing from justice" than that applied by me, there being a conflict among the circuits on this point. See Donnell v. United States, 229 F.2d 560 (5th Cir. 1956); Brouse v. United States, 68 F.2d 294 (1st Cir. 1933) but see King v. United States, 144 F.2d 729 (8th Cir.), cert. denied, 324 U.S. 854 (1944); McGowen v. United States, 105 F.2d 791 (D.C.Cir.), cert. denied, 308 U.S. 552 (1939).

The petitioner in this habeas corpus proceeding, Elijah Ephraim Jhirad, was Judge Advocate General of the Indian Navy. As such, between 1959 and 1961, he was in charge of a prize fund established for the benefit of certain Indian sailors who had served during World War II.

It is alleged by the Government of India that a substantial portion of the prize fund was embezzled by Jhirad. It is clear that the petitioner left India on July 26, 1966, and that the applicable five year statute of limitations, unless tolled, would have expired on September 27, 1966. The only question presented on the remand by the Court of Appeals is whether Jhirad left India with the "intent to flee from justice," which would toll the statute of limitations.

Magistrate Goettel held further hearings on the remand and filed "Additional Findings on Extradition Proceedings"

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in which he set forth (as best he could) the complete chronology of the events whereby Jhirad formed an "intent to flee" the jurisdiction of India.

February 19, 1966: The Central Bureau of Investigation in India was requested to commence an investigation concerning allegations that there had been mismanagement, and possibly embezzlement, from the Naval Prize Fund.

May, 1966: Jhirad informed a naval officer who had been directed to conduct an inquiry that the records of the Prize Fund had been destroyed (Jhirad had informed his superiors of this fact in the later part of 1965).\*

May 26, 1966: A subpoena duces tecum was issued to the Central Bank of India where the Naval Prize Fund had been maintained and where Jhirad had a personal account.\*\*

June, 1966: An employee of the Central Bank of India advised Jhirad that the subpoena had been received.\*

June 17, 1966: The Secretary General of the World Jewish Congress invited Jhirad to attend the Fifth Plenary Assembly in Brussels, July 31 to August 9, 1966.

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\* Jhirad denied that these events occurred.

\*\* The subpoena was issued under a criminal file number of an earlier and apparently dormant investigation concerning Jhirad's misuse of his business telephone and his having made extensive speculative investments.

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Subsequently, after being designated by the Central Jewish Board of Bombay as one of the representatives of Indian Jewry, the Congress agreed to defray his costs. (A week later his wife was invited to an auxiliary conference of Women's Zionist Organization held at the same time and place.)

June 28 to July 16, 1966: Jhirad and his wife sold various of his law books and other items of his personal possessions.

July 2, 1966: The case was officially registered with the Central Bureau of Investigation.

July 3, 1966: Jhirad obtained his passport.

July 5, 1966: The police began their investigation.

July 16 to July 22, 1966: Jhirad obtained visas to visit Belgium, France and Switzerland.

July 19, 1966: Jhirad obtained permission from his naval superiors to go to Brussels to attend the World Jewish Congress meeting.

July 26, 1966: Jhirad left India with his wife and children to attend the World Jewish Congress meeting. (He stopped en route for a few days in Switzerland.)

July 30 - August 10, 1966: Jhirad and his wife and family were in Brussels attending the World Jewish Conference.

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August 10, 1966: Jhirad and his family traveled to Geneva and resided there openly until 1967, when they emigrated to Israel.

Jhirad argues that he left India solely for the purpose of attending the World Jewish Conference and that he did not form the intention not to return to India until November or December of 1966. These dates are extremely important since the applicable statute of limitations would have time barred the extradition on September 25 or 27, 1966. Magistrate Goettel found, however, that while the "intent to flee" might not have existed at the time Jhirad left India on July 26, 1966, it certainly was formed by the early part or, at the latest by the midpoint, of September 1966, and thus that extradition was not time barred.

I have reviewed the entire record in this case: the exhibits, the transcripts, the affidavits and all other pertinent documents. I must conclude that the Magistrate's finding that Jhirad should be extradited was correct and that this petition for habeas corpus must be denied.

Had I been the trier of the facts I would perhaps have determined that the "intent to flee" to avoid prosecution was formed even prior to the time Jhirad left India. There is substantial evidence in the record to indicate that Jhirad knew that he was under investigation prior to that date.

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I have spent an enormous amount of time in re-viewing and re-reviewing the extensive record in this case. It shows that Jhirad in the latter part of 1965, admitted to his superiors in the Indian Navy that all the records of the prize fund had been destroyed; that the matter was referred by the Navy to the Special Police Establishment pursuant to a confidential memorandum to the Ministry of Defense; that in February 1966, the Central Bureau of Investigation commenced an inquiry to determine the whereabouts of the records; that on May 26, 1966, a subpoena duces tecum concerning these records was issued to and received by the Central Bank of India where the Prize Fund account was kept; that in June 1966, an employee of that bank informed Jhirad of the investigation and of the fact that the subpoena had been received.

At the time of these latter incidents, the petitioner was engaged in his own private law practice which apparently was somewhat successful. Between June 28, 1966 and July 16, 1966, petitioner and his wife disposed of various articles of personal property including law books and an air conditioner. All of his cases were adjourned to October and were left in the control of a junior associate, who was told that he could retain the fees in the matters.

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On the other hand, the petitioner supposedly left India leaving behind a good portion of his furnishings and leaving his sister in charge of a bank account worth \$10,000.

I have concluded, therefore, that Magistrate Goettel would be well within the evidence had he concluded that Jhirad had formed the necessary intent to flee prosecution at the time he left India on July 26, 1966. But it is not my province to try the matter de novo; it is sufficient for me to determine whether the conclusions of the Magistrate are supported by the evidence. In this it must be said that it is clear that the Magistrate was most fair. There is some evidence in the record that prior to 1966, when Jhirad took his family on trips to Europe, they would often take a vacation in Switzerland. The longest these vacations lasted was a month but generally they were restricted to one week. It would seem that the Magistrate theorized that the intent to flee matured when the supposed "vacation" in Switzerland exceeded by 150 per cent the longest prior vacation; and when combined with the facts set out above that the preponderance of the evidence would point to a solidified intent to flee to avoid prosecution. Certainly such "a striking change in [petitioner's] habits as to his customary places of resort" is a relevant consideration

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under Brouse v. United States, 68 F.2d 294, 296 (1st Cir. 1933).

I find that the Magistrate's finding and conclusion on the issue of intent is well-documented in the record and I will not overturn it.

The petitioner argues, however, that for there to be a tolling of the statute of limitations it is imperative that the petitioner have actually left India with the intent to flee prosecution and that intent had to have been fully matured at the time of leaving. I hold otherwise. To fully ascertain the question of intent one must examine the operation of another man's mind which is always a difficult problem for a finder of fact. Often judges are called upon to make this determination by evidence as to what happens after the crucial time. This is all that happened in this particular case. And rather than relate back the evidence concerning the maturation of intent the Magistrate gave petitioner every advantage in his construction of the evidence.

In any event, even if a defendant learns of potential prosecution while he is without a state and for that reason alone chooses not to return to his normal state, there may be a question of flight from justice. The question has been resolved against the petitioner and the evidence fully supports that ruling.

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The petitioner also argues, without citation to any authority, that the burden of proof which the Government of India must bear to show that Jhirad was a fugitive from justice in the extradition proceeding must be that required in an ordinary criminal case in this country, i.e., that each element must be proved beyond a reasonable doubt. The petitioner claims that the Government of India did not establish "intent to flee" beyond a reasonable doubt and Magistrate Goettel has so found. Additional Findings, p. 12.

The treaty under which India seeks to extradite petitioner provides that "the extradition shall not take place if . . . exemption from prosecution or judgment has been acquired by lapse of time, according to the laws of [either country]." Petitioner argues that this provision requires that in determining whether the statute of limitations was tolled I must apply the traditional standard used in criminal cases, i.e., beyond a reasonable doubt. I find no support for petitioner's position in either the language of the treaty or the case law on this subject.

As I stated in an earlier opinion in this case: "It is important to remember the context within which this decision must be made. This is an extradition case, involving activity which has taken place halfway around the world. The extradition procedures afforded by statute seek

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to preserve an element of judicial surveillance over a procedure which is basically an action of international comity. . . . In fact, the procedures fall strikingly short of a full trial." 362 F. Supp. 1060. The Magistrate correctly rejected the petitioner's reasonable doubt argument.

The petitioner puts forth two additional arguments: one, that the Magistrate had no power to make findings on the issue of the remand, and two, the evidence relied upon was incompetent and inadmissible because it denied him of the opportunity to confront and cross-examine the witnesses against him. I find that in the context of an extradition proceeding both of these arguments are without merit and that the procedures followed by the Magistrate were correct.

The petition for a writ of habeas corpus is denied.  
SO ORDERED.

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U. S. D. J.

Dated: New York, New York  
July 17, 1975.

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## UNITED STATES COURT OF APPEALS

## Second Circuit



At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 21st day of October, one thousand nine hundred and seventy-five.

Elijah Ephraim Jhirad,

petitioner.

v.

Thomas E. Ferrandina, United States  
Marshal, Southern District of New York,

Respondent.

It is hereby ordered that the motion made herein by counsel for the

appellant

appellee

petitioner

respondent

by notice of motion dated October 14, 1975 to extend the time to file a brief to and including 30 days after decision on the instant motion; to reconstitute missing portions of the record on appeal, and for leave to file typewritten briefs and dispense with filing a joint appendix, and it hereby is granted ~~denied~~ GRANTED to the following extent:

- (1) The times specified in the scheduling order of August 7, 1975 are extended as follows:
- (a) Appellant's brief and relevant portions of the record shall be filed by November 14, 1975.
  - (b) Appellee's brief shall be filed by Dec. 15, 1975.
  - (c) Counsel shall be ready for oral argument during the week of January 5, 1976.
- (2) Leave is granted to appellant to reconstitute the missing portions of the record on appeal from authentic copies and other credible sources.
- (3) Leave is granted to prosecute the appeal on typewritten briefs and by dispensing with a printed appendix provided that four copies of relevant portions of the record are filed.

WILLIAM H. TIMBERS Circuit Judges

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EXTRADITION TREATY - GREAT BRITAIN. DECEMBER 22, 1931

EXTRADITION TREATY between the United States of America and Great Britain and Ireland, extending the application of the Treaty to Portugal and Transvaal, signed at London, December 22, 1931; ratification advised by the Senate of the United States, February 19, 1932; ratified by the President of the United States, March 6, 1932; ratified by Great Britain, July 27, 1932; ratifications exchanged at London, August 5, 1932; promulgated, August 6, 1932.

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA

A PROCLAMATION

Extradition with  
Great Britain.

Preamble.

WHEREAS an extradition treaty between the United States of America and Great Britain was concluded and signed by their respective Plenipotentiaries at London on December 22, 1931, the original of which treaty is word for word as follows:

Contracting Powers.

The President of the United States of America,  
And His Majesty the King of Great Britain, Ireland and the  
British Dominions beyond the Seas, Emperor of India;

Desiring to make more adequate provision for the reciprocal  
extradition of criminals,

Plenipotentiaries.

Have resolved to conclude a Treaty for that purpose, and to that  
end have appointed as their plenipotentiaries:

The President of the United States of America:

General Charles G. Dawes, Ambassador Extraordinary and  
Plenipotentiary of the United States of America at the  
Court of St. James;

And His Majesty the King of Great Britain, Ireland and the  
British Dominions beyond the Seas, Emperor of India:

for Great Britain and Northern Ireland:

The Right Honourable Sir John Simon, G.C.S.I., M.P., His  
Principal Secretary of State for Foreign Affairs;

who, having communicated their full powers, found in good and  
due form, have agreed as follows:—

ARTICLE 1.

High Contracting  
Parties  
respectively  
concerned  
with  
extradition.

The High Contracting Parties engage to deliver up to each other,  
under certain circumstances and conditions stated in the present  
Treaty, those persons who, being accused or convicted of any of the  
crimes or offenses enumerated in Article 3, committed within the  
jurisdiction of the one Party, shall be found within the territory of  
the other Party.

ARTICLE 2.

Territorial extent  
of the  
Treaty.

For the purpose of the present Treaty the territory of His  
Britannic Majesty shall be deemed to be Great Britain and Northern  
Ireland, the Channel Islands, and the Isle of Man, and all parts of  
His Britannic Majesty's dominions overseas other than those

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set out in Article 14, together with the territories enumerated in Article 13 and any territories to which it may be extended under Article 12. It is understood that in respect of all territory of His Britannic Majesty as above defined other than Great Britain and Ireland, the Channel Islands, and the Isle of Man, the present Treaty shall be applied so far as the laws permit, for the purposes of the present Treaty the territory of the United States shall be deemed to be all territory wherever situated belonging to the United States, including its dependencies; and all territories under its exclusive administration or control.

ARTICLE 3.

| Extradition shall be reciprocally granted for the following crimes and offences:—  | Extraditable crimes.                |
|--|-------------------------------------|
| 1. Murder (including assassination, parricide, infanticide, poisoning), or attempt or conspiracy to murder.  | Murder.                             |
| 2. Manslaughter.   | Manslaughter.                       |
| 3. Administering drugs or using instruments with intent to procure the miscarriage of women.   | Procuring miscarriage.              |
| 4. Rape.   | Rape.                               |
| 5. Unlawful carnal knowledge, or any attempt to have unlawful carnal knowledge, of a girl under 16 years of age.   | Unlawful carnal knowledge.          |
| 6. Inherent assault if such crime or offence be indictable in the place where the accused or convicted person is apprehended.  | Indecent assault.                   |
| 7. Kidnapping or false imprisonment.   | Kidnapping.                         |
| 8. Child stealing, including abandoning, exposing or unlawfully detaining.   | Child stealing, etc.                |
| 9. Abduction.  | Abduction.                          |
| 10. Procuration: that is to say the procuring or transporting of a woman or girl under age, even with her consent, for immoral purposes, or of a woman or girl over age, by fraud, threats, or compulsion, for such purposes with a view in either case to gratifying the passions of another person provided that such crime or offence is punishable by imprisonment for at least one year or by more severe punishment. | Procuration.                        |
| 11. Bigamy.  | Bigamy.                             |
| 12. Malicious wounding or inflicting grievous bodily harm.   | Assault.                            |
| 13. Threats, by letter or otherwise, with intent to extort money or other things of value.   | Blackmail, etc.                     |
| 14. Perjury, or subornation of perjury.  | Perjury.                            |
| 15. Arson.   | Arson.                              |
| 16. Burglary or housebreaking, robbery with violence, larceny or embezzlement.   | Burglary, etc.                      |
| 17. Fraud by a bailee, banker, agent, factor, trustee, director, member, or public officer of any company, or fraudulent conversion.   | Fraud.                              |
| 18. Obtaining money, valuable security, or goods, by false pretences; receiving any money, valuable security, or other property, knowing the same to have been stolen or unlawfully obtained.  | Obtaining money by false pretences. |
| 19.—(a) Counterfeiting or altering money, or bringing into circulation counterfeited or altered money.   | Counterfeiting.                     |
| (b) Knowingly and without lawful authority making or having in possession any instrument, tool, or engine adapted and intended for the counterfeiting of coin.   |                                     |

21<sup>st</sup> EXTRADITION TREATY - GREAT BRITAIN. DECEMBER 12, 1870.

|   |   |
|---|---|
| Prize.  | 20. Piracy, or carrying what is stolen.   |
| Piracy by law of<br>Prize.  | 21. Crimes or offences against bankruptcy law.  |
| Indictable, etc.<br>Crimes or offences<br>against dangerous<br>drugs. | 22. Bribery, defined to be the offering, giving or receiving of<br>bribes.  |
| Property damage.  | 23. Any malicious act done with intent to endanger the safety<br>of any persons travelling or being upon a railway.   |
| Property damage.  | 24. Crimes or offences or attempted crimes or offences in connection<br>with the traffic in dangerous drugs.  |
| Money.<br>Murder, etc.  | 25. Malicious injury to property, if such crime or offence be<br>indictable.  |
| Slave trading.  | 26.—(a) Piracy by the law of nations.<br>(b) Revolt, or conspiracy to revolt, by two or more per-<br>sons on board a ship on the high seas against the authority<br>of the master; wrongfully sinking or destroying a vessel<br>at sea, or attempting to do so; assaults on board a ship<br>on the high seas, with intent to do grievous bodily harm. |
| Accessories.  | 27. Dealing in slaves.  |

Extradition is also to be granted for participation in any of the  
aforesaid crimes or offences, provided that such participation be  
punishable by the laws of both High Contracting Parties.

Article 4.

Trial, etc., clauses.

The extradition shall not take place if the person claimed has  
already been tried and discharged or punished, or is still under  
trial in the territories of the High Contracting Party applying  
for the crime or offence for which his extradition is demanded.

If the person claimed should be under examination or under  
punishment in the territories of the High Contracting Party applying  
to for any other crime or offence, his extradition shall be deferred  
until the conclusion of the trial and the full execution of any punishment  
awarded to him.

Article 5.

Time limitation.

The extradition shall not take place if, subsequently to the com-  
mission of the crime or offence or the institution of the criminal pro-  
cution or the conviction thereon, exemption from prosecution or  
punishment has been acquired by lapse of time, according to the laws  
of the High Contracting Party applying or applied to.

Article 6.

Petition clauses.

A fugitive criminal shall not be surrendered if the crime or offence  
in respect of which his surrender is demanded is one of a political  
character, or if he proves that the requisition for his surrender has,  
in fact, been made with a view to try or punish him for a crime or  
offence of a political character.

Article 7.

Crime committed  
before or after  
extradition.

A person surrendered can in no case be kept in custody or be  
brought to trial in the territories of the High Contracting Party to  
whom the surrender has been made for any other crime or offence,  
or on account of any other matter, than those for which the extra-  
dition shall have taken place, until he has been restored, or has had  
an opportunity of returning, to the territories of the High Contract-  
ing Party by whom he has been surrendered.

This stipulation does not apply to crimes or offences committed  
after the extradition.

EXTRADITION TREATY - GREAT BRITAIN. DECEMBER 29, 1931. 2125

ARTICLE 8.

The extradition of fugitive criminals under the provisions of this <sup>Extradition to one</sup> <sub>territory</sub> Party shall be carried out in the United States and in the territory of His Britannic Majesty respectively, in conformity with the laws <sup>territory</sup> <sub>territory</sub> relating extradition for the time being in force in the territory <sup>in which</sup> <sub>in which</sub> the surrender of the fugitive criminal is claimed.

ARTICLE 9.

The extradition shall take place only if the evidence be found sufficient, according to the laws of the High Contracting Party applied to, either to justify the committal of the prisoner for trial, in case the crime or offence had been committed in the territory of such High Contracting Party, or to prove that the prisoner is the identical person convicted by the courts of the High Contracting Party who makes the requisition, and that the crime or offence of which he has been convicted is one in respect of which extradition <sup>Conditions imposed.</sup> <sub>which at the time of such conviction, have been granted by the High Contracting Party applied to.</sub>

ARTICLE 10.

If the individual claimed by one of the High Contracting Parties in pursuance of the present Treaty should be also claimed by one or several other Powers on account of other crimes or offences committed within their respective jurisdictions, his extradition shall be granted to the Power whose claim is earliest in date, unless such claim is waived. <sup>Persons claimed by other countries.</sup>

ARTICLE 11.

If insufficient evidence for the extradition be not produced within two months from the date of the apprehension of the fugitive, or within such further time as the High Contracting Party applied to, the proper tribunal of such High Contracting Party, shall direct, the fugitive shall be set at liberty. <sup>Time limitation.</sup>

ARTICLE 12.

All articles seized which were in the possession of the person to be surrendered at the time of his apprehension, and any articles that may serve as a proof of the crime or offence shall be given up <sup>Articles seized with</sup> <sub>to/for</sub> on the extradition takes place, in so far as this may be permitted by the law of the High Contracting Party granting the extradition.

ARTICLE 13.

All expenses connected with the extradition shall be borne by <sup>Expenses</sup> the High Contracting Party making the application.

ARTICLE 14.

His Britannic Majesty may accede to the present Treaty on behalf of any of his Dominions hereafter named—that is to say, the Dominion of Canada, the Commonwealth of Australia (including for this purpose Papua and Norfolk Island), the Dominion of New Zealand, the Union of South Africa, the Irish Free State, and Newfoundland—and India. Such accession shall be effected by a notice to that effect given by the appropriate diplomatic representative of His Majesty at Washington which shall specify the authority to which the requisition for the surrender of a fugitive criminal <sup>Accession by Great Britain.</sup> <sub>who has taken refuge in the Dominion concerned, or India, as the case may be, shall be addressed. From the date when such notice</sub>

2726 EXTRADITION TREATY—GREAT BRITAIN, DECEMBER 1933.

*Provisions*  
comes into effect the territory of the Dominion concerned or of which shall be deemed to be territory of His Britannic Majesty for purposes of the present Treaty.

*Supervisory of designated Dominions, etc.*  
The requisition for the surrender of a fugitive criminal has taken refuge in any of the above-mentioned Dominions or in on behalf of which His Britannic Majesty has acceded, shall be made by the appropriate diplomatic or consular officer of the United States of America.

*British mandates.*

Either High Contracting Party may terminate this Treaty separately in respect of any of the above-mentioned Dominions or of which. Such termination shall be effected by a notice given in accordance with the provisions of Article 18.

*Supervisory of designated Dominions, etc.*  
Any notice given under the first paragraph of this Article respect of one of His Britannic Majesty's Dominions may include any territory in respect of which a mandate on behalf of the League of Nations has been accepted by His Britannic Majesty, and which is being administered by the Government of the Dominion concerned; such territory shall, if so included, be deemed to be territory of His Britannic Majesty for the purposes of the present Treaty. A notice given under the third paragraph of this Article shall be applicable to such mandated territory.

ARTICLE 15.

*Fugitives in British territory.*

The requisition for the surrender of a fugitive criminal who has taken refuge in any territory of His Britannic Majesty other than Great Britain and Northern Ireland, the Channel Islands, or the Isle of Man, or the Dominions or India mentioned in Article 14, shall be made to the Governor, or chief authority, of such territory by the appropriate consular officer of the United States of America.

Such requisition shall be dealt with by the competent authority of such territory; provided, nevertheless, that if an order for the committal of the fugitive criminal to prison to await surrender shall be made, the said Governor or chief authority may, instead of issuing a warrant for the surrender of such fugitive, refer the matter to His Britannic Majesty's Government in the United Kingdom of Great Britain and Northern Ireland.

ARTICLE 16.

*Applicability to designated British protectorates.*

This Treaty shall apply in the same manner as if they were possessions of His Britannic Majesty to the following British Protectorates, that is to say, the Bechuanaland Protectorate, Gambia Protectorate, Kenya Protectorate, Nigeria Protectorate, North Rhodesia, Northern Territories of the Gold Coast, Nyasaland, Sierra Leone Protectorate, Solomon Islands Protectorate, Somaliland Protectorate, Swaziland, Uganda Protectorate and Zanzibar, and to the following territories in respect of which a mandate on behalf of the League of Nations has been accepted by His Britannic Majesty, that is to say, Cameroons under British mandate, Togoland under British mandate, and the Tanganyika Territory.

ARTICLE 17.

*Extending provisions to other territory.*

If after the signature of the present Treaty it is considered advisable to extend its provisions to any British Protectorates other than those mentioned in the preceding Article or to any British protected State, or to any territory in respect of which a mandate on behalf of the League of Nations has been accepted by His Britannic Majesty, other than those mandated territories mentioned in Articles 14 and 16, the stipulations of Articles 14 and 15 shall be deemed

EXTRADITION TREATY--GREAT BRITAIN. DECEMBER 22, 1931. 2127

apply to such Dependencies or Cities or unadmitted territories from the date and in the manner prescribed in the notes to be exchanged for the purpose of effecting such extension.

Article 18.

The present Treaty shall come into force ten days after its publication, in conformity with the forms prescribed by the laws of the High Contracting Parties. It may be terminated by either of the High Contracting Parties by a notice not exceeding one year and not less than six months.

In the absence of an express provision to that effect, a notice given under the first paragraph of this Article shall not affect the operation of the Treaty as between the United States of America and any territory in respect of which notice of accession has been given under Article 14.

The present Treaty shall be ratified, and the ratifications shall be exchanged at London as soon as possible.

On the coming into force of the present treaty the provisions of Article 10 of the treaty of the 9th August, 1842, of the Convention of the 12th July, 1858, of the supplementary Convention of the 13th December, 1900, and of the supplementary Convention of the 12th April, 1905, relative to extradition, shall cease to have effect, save that in the case of each of the Dominions and India, mentioned in Article 14, those provisions shall remain in force until such Dominion or India shall have acceded to the present treaty in accordance with Article 14 or until replaced by other treaty arrangements.

In faith whereof the above-named plenipotentiaries have signed the present Treaty and have affixed thereto their seals.

Done in duplicate at London this twenty-second day of December, 1931.

[SEAL]

[SEAL]

CHARLES G. DAWES

JOHN SIMON

AND WHEREAS, the said treaty has been duly ratified on both parts, and the ratifications of the two Governments were exchanged at London on the fourth day of August, one thousand nine hundred and thirty-two:

Now, THEREFORE, be it known that I, Herbert Hoover, President of the United States of America, have caused the said treaty to be made public, to the end that the same and every article and clause thereof may be observed and fulfilled with good faith by the United States of America and the citizens thereof.

IN TESTIMONY WHEREOF, I have hereunto set my hand and caused the seal of the United States of America to be affixed.

Done at the city of Washington this ninth day of August in the year of our Lord one thousand nine hundred and thirty-two, and of the Independence of the United States of America the one hundred and fifty-seventh.

HERBERT HOOVER

By the President:

HENRY L. STIMSON

Secretary of State.

Effective date.

Duration.

Separability clause.

Ratification.

Certain treaty provisions abrogated.  
Vol. 8, p. 356; Vol. 23,  
p. 152; Vol. 32, p. 1:51;  
Vol. 31, p. 200.

Ratifications ex-  
changed.

Proclamation.

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2426 EXTRADITION TREATY--GREAT BRITAIN. DECEMBER 22, 1931.

EXTRADITION TREATY  
NOTES EXCHANGED CONCERNING THE EXTENSION TO PALESTINE AND  
TRANSDJORDAN OF THE EXTRADITION TREATY BETWEEN THE UNITED  
STATES OF AMERICA AND GREAT BRITAIN

The British Secretary of State for Foreign Affairs (Simon) to the  
American Ambassador (Dawes)

No. T 15523/46/374.

FOREIGN OFFICE, S.W. 1.

22nd December, 1931.

And, p. 2124.

YOUR EXCELLENCY,

With reference to Article 17 of the Extradition Treaty between  
His Majesty The King of Great Britain, Ireland and the British  
Dominions beyond the Seas and the President of the United States  
of America, signed this day at London, I have the honour to inform  
Your Excellency that His Majesty's Government in the United  
Kingdom desire that the provisions of the above mentioned Treaty  
shall, as from the date of its entry into force, be applicable to  
Palestine (excluding Transjordan).

2. I have accordingly the honour to enquire whether the United  
States Government agree with this proposal. In this event the  
present note and Your Excellency's reply to that effect will be  
regarded as placing on record the agreement arrived at in the  
matter.

I have the honour to be, with the highest consideration,  
Your Excellency's obedient Servant,

HIS EXCELLENCY

GENERAL CHARLES G. DAWES, C.B.,  
etc., etc., etc.

JOHN SIMON

The American Ambassador (Dawes) to the British Secretary of  
State for Foreign Affairs (Simon)

No. 1582.

EMBASSY OF THE UNITED STATES OF AMERICA

LONDON, December 22, 1931.

SIR:

With reference to Article 17 of the Extradition Treaty between  
the President of the United States of America and His Majesty  
The King of Great Britain, Ireland and the British Dominions  
beyond the Seas, signed this day at London, I have the honor to  
inform you that the Government of the United States of America  
is agreeable to the proposal of His Majesty's Government in the  
United Kingdom that the provisions of the above mentioned Treaty  
shall, as from the date of its entry into force, be applicable to  
Palestine (excluding Transjordan).

I have the honor to be, with the highest consideration, Sir,  
Your most obedient, humble Servant,

THE RIGHT HON<sup>BLE</sup>

SIR JOHN SIMON, G.C.S.I., etc., etc., etc.,  
Foreign Office, S.W. 1.

CHARLES G. DAWES.

EXTRADITION

NOTES EXCHANGED

No. T 15523.

Yours EXCELLENT

With refer-

His Majesty

Dominions be-

of America, s-

Your Excellen-

cy desire th-

as from the da-

2. I have ac-

States Gover-

present note a-

arded as plac-

I have the h-

Your Ex-

His EXCELLENT

GENERAL

etc.,

The American

No. 1583.

SIR:

With reference  
the President of  
King of Great B-  
the Seas, signed  
that the Gover-  
to the proposal  
done that the prev-  
the date of its en-

I have the hon-

Your most

THE RIGHT HON-

SIR JOHN S-

Foreign

A-111

EXTRADITION TREATY--GREAT BRITAIN. DECEMBER 22, 1931. 2120

British Secretary of State for Foreign Affairs (Simon) to the <sup>Embassy of America</sup> ~~etc.~~ American Ambassador (Dawes)

Ref: MSS. 46/374.

FOREIGN OFFICE, S.W. 1.

22nd December, 1931.

My Excellency,

With reference to Article 17 of the Extradition Treaty between <sup>Am. p. 2126.</sup> His Majesty The King of Great Britain, Ireland and the British Dominions beyond the Seas and the President of the United States of America, signed this day at London, I have the honour to inform Your Excellency that His Majesty's Government in the United Kingdom desire that the provisions of the above mentioned Treaty shall, as from the date of its entry into force, be applicable to Transjordan.

I have accordingly the honour to enquire whether the United States Government agree with this proposal. In this event the present note and Your Excellency's reply to that effect will be regarded as placing on record the agreement arrived at in the matter.

I have the honour to be, with the highest consideration,

Your Excellency's obedient Servant,

JOHN SIMON

My Excellency

GENERAL CHARLES G. DAWES, C.B.,

etc., etc., etc.

My American Ambassador (Dawes) to the British Secretary of State for Foreign Affairs (Simon)

Ref: MSS.

EMBASSY OF THE UNITED STATES OF AMERICA

LONDON, December 22, 1931.

With reference to Article 17 of the Extradition Treaty between the President of the United States of America and His Majesty The King of Great Britain, Ireland and the British Dominions beyond the Seas, signed this day at London, I have the honor to inform you that the Government of the United States of America is agreeable to the proposal of His Majesty's Government in the United Kingdom that the provisions of the above mentioned Treaty shall, as from the date of its entry into force, be applicable to Transjordan.

I have the honor to be, with the highest consideration, Sir,

Your most obedient, humble Servant,

CHARLES G. DAWES.

The Right Hon. Sir

Sir JOHN SIMON, G.C.S.I., etc., etc., etc.,

Foreign Office, S.W. 1.

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## EXTRADITION STATUTES

### **§ 3131. Scope and limitation of chapter**

The provisions of this chapter relating to the surrender of persons who have committed crimes in foreign countries shall continue in force only during the existence of any treaty of extradition with such foreign government.

June 25, 1948, c. 615, 62 Stat. 822.

#### **Historical and Revision Notes**

Reviser's Note. Based on Title 18, U. S.C., 1940 ed., § 658 (U.S. § 5270). Minor changes were made in phraseology. 80th Congress House Report No. 501.

### **§ 3184. Fugitives from foreign country to United States**

Whenever there is a treaty or convention for extradition between the United States and any foreign government, any justice or judge of the United States, or any magistrate authorized so to do by a court of the United States, or any judge of a court of record of general jurisdiction of any State, may, upon complaint made under oath, charging any person found within his jurisdiction, with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge, or magistrate, to the end that the evidence of criminality may be heard and considered. If, on such hearing, he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, he shall certify the same, together with a copy of all the testimony taken before him, to the Secretary of State, that a warrant may issue upon the requisition of the proper authorities of such foreign government, for the surrender of such person, according to the stipulations of the treaty or convention; and he shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made.

June 25, 1948, c. 615, 62 Stat. 822; Oct. 17, 1968, Pub.L. 90-578, Title III, § 301(a) (3), 82 Stat. 1115.

#### **Historical and Revision Notes**

Reviser's Note. Based on Title 18, U. S.C., 1940 ed., § 651 (U.S. § 5270); June 6, 1968, c. 723, 81 Stat. 650.

Minor changes of phraseology were made. 80th Congress House Report No. 501.

1968 Amendment. Pub.L. 90-578 substituted "magistrate" for "commissioner" in two instances.

Effective Date of 1968 Amendment. Amendment by Pub.L. 90-578 effective Oct. 17, 1968, except when a later effec-

tive date is applicable, which is the earlier of date when implementation of amendment by appointment of magistrates and assumption of office takes place or third anniversary of enactment of Pub.L. 90-578 on Oct. 17, 1968, see section 403 of Pub.L. 90-578, set out as a note under section 631 of Title 28, Judiciary and Judicial Procedure.

Legislative History. For legislative history and purpose of Pub.L. 90-578, see 1968 U.S. Code Cong. and Adm. News, p. 4252.

**NON-CAPITAL STATUTE OF LIMITATIONS  
AND  
TOLLING PROVISION**

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**§ 3282. Offenses not capital**

Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed.

June 25, 1948, c. 645, 62 Stat. 828; Sept. 1, 1954, c. 1214, § 12(a), formerly § 10(a), 68 Stat. 1145, renumbered Sept. 26, 1961, Pub.L. 87-299, § 1, 75 Stat. 648.

**Historical and Revision Notes**

**Reviser's Note.** Based on section 746 (g) of Title 8, U.S.C., 1910 ed., Aliens and Nationality, and on Title 18, U.S.C., 1910 ed., § 552 (R.S. § 1011; Apr. 15, 1876, c. 56, 19 Stat. 32; Nov. 17, 1921, c. 124, § 1, 42 Stat. 220; Dec. 27, 1927, c. 6, 45 Stat. 51; Oct. 11, 1940, c. 876, Title I, Subchap. III, § 316(g), 51 Stat. 1167 [Derived from June 29, 1906, c. 350, § 24, 31 Stat. 693]].

Section 552 of Title 18, U.S.C., 1910 ed., and section 716(g) of Title 8, U.S.C., 1910 ed., Aliens and Nationality, were consolidated. "Except as otherwise expressly provided by law" was inserted to avoid enumeration of exceptive provisions.

The proviso contained in the act of 1927 "That nothing herein contained shall apply to any offense for which an indictment has been heretofore found or an information instituted, or to any proceedings under any such indictment or information," was omitted as no longer necessary.

In the consolidation of these sections the 5-year period of limitation for viola-

tions of the Nationality Code, provided for in said section 746(g) of Title 8, U.S.C., 1910 ed., Aliens and Nationality, is reduced to 3 years. There seemed no sound basis for considering 3 years adequate in the case of heinous felonies and gross frauds against the United States but inadequate for misuse of a passport or false statement to a naturalization examiner. 80th Congress House Report No. 301.

**1954 Amendment.** Act Sept. 1, 1954 changed the limitation period from three years to five years.

**Effective Date of 1954 Amendment.** Section 12(b) of Act Sept. 1, 1954, formerly section 10(b), as renumbered by Pub. L. 87-299, § 3, provided that: "The amendment made by subsection (a) [amending this section] shall be effective with respect to offenses (1) committed on or after September 1, 1954, or (2) committed prior to such date, if on such date prosecution therefor is not barred by provisions of law in effect prior to such date."

**§ 3290. Fugitives from justice**

No statute of limitations shall extend to any person fleeing from justice.

June 25, 1948, c. 645, 62 Stat. 829.

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## HABEAS CORPUS STATUTES

### **§ 2241. Power to grant writ**

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

(c) The writ of habeas corpus shall not extend to a prisoner unless—

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial.

(d) Where an application for a writ of habeas corpus is made by a person in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody or in the district court for the district within which the State court was held which convicted and sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the application. The district court for the district wherein such an application is filed in the exercise of its discretion and in furtherance of justice may transfer the application to the other district court for hearing and determination.

June 25, 1948, c. 646, 62 Stat. 964; May 24, 1949, c. 139, § 112, 63 Stat. 105; Sept. 19, 1966, Pub.L. 89-590, 80 Stat. 811.

#### **Historical and Revision Notes**

**Reviser's Notes.** Based on Title 28 U.S.C., 1940 ed., §§ 451, 452, 453 (R.S. §§ 751, 752, 753; Mar. 3, 1911, c. 231, § 291, 36 Stat. 1167; Feb. 13, 1923, c. 229, § 6, 43 Stat. 940).

Section consolidates sections 451, 452 and 453 of Title 28, U.S.C., 1940 ed., with changes in phraseology necessary to effect the consolidation.

Words "for the purpose of an inquiry into the cause of restraint of liberty" in section 452 of Title 28, U.S.C., 1940 ed., were omitted as merely descriptive of the writ.

Subsection (b) was added to give statutory sanction to orderly and appropriate procedure. A circuit judge who unnecessarily entertains applications which should be addressed to the district court, thereby disqualifies himself to hear such matters on appeal and to that extent limits his usefulness as a judge of the court of appeals. The Supreme Court and Supreme Court Justices should not be burdened with applications for writs cognizable in the district courts. 80th Congress House Report No. 308.

**1966 Amendment.** Subsec. (d). Pub.L. 89-590 added subsec. (d).

## HABEAS CORPUS STATUTES

### **§ 2246. Evidence; depositions; affidavits**

On application for a writ of habeas corpus, evidence may be taken orally or by deposition, or, in the discretion of the judge, by affidavit. If affidavits are admitted any party shall have the right to propound written interrogatories to the affiants, or to file answering affidavits.

June 25, 1948, c. 646, 62 Stat. 966.

#### **Historical and Revision Notes**

Reviser's Note. This section is derived from H.R. 4232 introduced in the first session of the Seventy-ninth Congress by Chairman Sumners of the House Committee on the Judiciary. It clarifies existing practice without substantial change. 80th Congress House Report No. 308.

Chairman Sumners of the House Committee on the Judiciary.

### **§ 2243. Issuance of writ; return; hearing; decision**

A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto.

The writ, or order to show cause shall be directed to the person having custody of the person detained. It shall be returned within three days unless for good cause additional time, not exceeding twenty days, is allowed.

The person to whom the writ or order is directed shall make a return certifying the true cause of the detention.

When the writ or order is returned a day shall be set for hearing, not more than five days after the return unless for good cause additional time is allowed.

Unless the application for the writ and the return present only issues of law the person to whom the writ is directed shall be required to produce at the hearing the body of the person detained.

The applicant or the person detained may, under oath, deny any of the facts set forth in the return or allege any other material facts.

The return and all suggestions made against it may be amended, by leave of court, before or after being filed.

The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require.

June 25, 1948, c. 646, 62 Stat. 965.

#### **Historical and Revision Notes**

Reviser's note. Based on Title 28 U.S.C., Section consolidates sections 453-461 of 1910 ed., §§ 455, 456, 457, 458, 459, 460, and Title 28, U.S.C., 1910 ed., 461 (R.S. §§ 755-761).

2 A Of course.

3 Q Now, you know that the case we have before  
4 us today deals with the crime of embezzlement.

5 A Yes.

6 Q Embezzlement is a crime under the laws  
7 of India?

8 A Criminal breach of trust, which is known  
9 as embezzlement, is defined under Section 405 of  
10 the Indian Penal Code.

11 Section 406 prescribes the punishment for  
12 a simple criminal breach of trust.

13 Sections 407, 408 and 409 relate to  
14 aggravated forms of the criminal breach of trust.

15 Q Now, how do you define or how does the  
16 statute define or the cases under the statute define  
17 an aggravated breach of trust?

18 MR. SADOWSKY: Your Honor, first of all.  
19 it is a multi-phased question. If it is statutory,  
20 then we should know -- if it is statutory, we can  
21 have the statute referred to, and he doesn't have to  
22 summarize it.

23 THE MAGISTRATE: Answer first with respect  
24 to the statute.

25 MR. SADOWSKY: You are reading from what?

1

cp

Mehta-cross

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2

THE MAGISTRATE: What does it carry as a maximum penalty?

4

THE WITNESS: Section 406 carries a punishment of three years or with fine or with both.

6

407 carries a punishment which may extend to seven years and also fines. 409 carries a punishment of imprisonment which may extend to ten years and should also be liable to fine.

10

BY MR. SADOWSKY:

11

Q You stated that in your opinion the offense with which Mr. Jhirad is charged is extraditable.

13

A Yes.

14

Q What is the basis of your opinion?

15

A The basis of my opinion is because criminal breach of trust is an embezzlement, and an offense of an embezzlement is extraditable under the terms of the Extradition Agreement between the governments.

19

Q So that you are relying upon that portion of the treaty which provides specifically that embezzlements are subject to extradition and you are stating therefore that Mr. Jhirad is charged with an embezzlement under Indian law; is that correct?

24

A Yes.

25

Q And because he is so charged that is

2 Q. What is a senior advocate?

3 A. Under the Supreme Court rules we will have  
4 to check up the rules before I can commit anything.  
5 Unless I have seen the rules, I can't say what are  
6 the necessary conditions for becoming a senior ad-  
7 vocate. I know there are senior advocates and there  
8 are advocates on record in the Supreme Court of India.9 Q. Do you know whether Mr. Jhärad was a senior  
10 advocate?

11 A. No, I do not.

12 Q. Mr. Mehta, you said that you believe that  
13 a breach of trust is the same as an embezzlement.

14 A. Yes.

15 Q. Why do you believe that?

16 A. Because I have gone to the books. I will  
17 say that corpus juris also says like that.18 Q. Is there something in your law which defines  
19 breach of trust as an embezzlement?20 A. Our law -- there is no particular section  
21 of the law which may say that criminal breach of trust  
22 is an embezzlement, but criminal breach of trust and  
23 embezzlement are one and the same thing.24 Q. How do you know that? What do you base  
25 your opinion that they are one and the same thing?

2 A Because the embezzlement is the fraudulent  
3 appropriation of another's property by a person to  
4 whom it has been entrusted or to whom hands it has  
5 lawfully come.

6 Q That is a definition of an embezzlement?

7 A Yes.

8 Q Whose definition is that?

9 A That is Corpus Juris.

10 Q That is a definition you found from Corpus  
11 Juris?

12 A Yes.

13 Q This is upon which you base your opinion?

14 A Yes.

15 MR. SADOWSKY: I would like a three-minute  
16 recess.

17 THE MAGISTRATE: All right.

18 (Short recess.)

19 THE MAGISTRATE: Let's continue, gentle-  
20 men.

21 MR. SADOWSKY: I have no further questions  
22 of the witness.

23 MR. LOUIS STEINBERG: I have nothing.

24 THE WITNESS: I think I had not finished  
25 my last embezzlement business.

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2 admiral. I don't know that the exact date is  
3 of any tremendous significance. If it is,  
4 it's not apparent to me.

5 MR. SADOWSKY: The only thing I  
6 was attempting to establish was that the conver-  
7 sation that the interview was triggered by the  
8 letter from John and that it took place sometime  
9 prior to November 10, 1965.

10 THE MAGISTRATE: I think that's very  
11 certain.

12 MR. SADOWSKY: That's all I was  
13 attempting to establish.

14 BY MR. SADOWSKY:

15 Q Mr. Nand, do you know whether a naval  
16 board of inquiry was appointed subsequent to  
17 Admiral Nair's memorandum?

18 MR. LOUIS STEINBERG: I object to that.  
19 Mr. Jhirad was not part of the navy as such.  
20 He was a civilian employee.

21 THE MAGISTRATE: Well, I understand  
22 that, Mr. Steinberg. But, he was dealing with  
23 naval matters and they may or may not have appointed  
24 a board of inquiry. It doesn't hurt to ask the  
25 question if the witness knows.

2  
2 Was there a board of inquiry?3  
3 THE WITNESS: Would you mind repeating  
4  
4 the question?5  
5 (Question read)6  
6 THE WITNESS: No, not to my knowledge.7  
7 Q I want you to turn again now to  
8  
8 Exhibit 6, that is your statement in case 34/2  
9  
9 and once again turning to the affidavit or the  
10  
10 statement of Admiral Nair appearing on page 17.  
11  
11 May I have it just for a moment, please?12  
12 A Right.13  
13 Q Now, do you recall your testimony  
14  
14 before us last time concerning a prior investiga-  
15  
15 tion conducted by your office with respect to  
16  
16 Mr. Jhirad, is that correct? There was a  
17  
17 prior investigation?18  
18 A There was a prior investigation.19  
19 Q The question for you then is whether  
20  
20 Admiral Nair on page 17 of his statement sets  
21  
21 forth the nature of that prior investigation.22  
22 A Yes, he has made a mention on page 17.23  
23 THE MAGISTRATE: Before you get away  
24  
24 from that, why don't you tell me what he said.25  
25 MR. SADOWSKY: I will.

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2 prior to the time that these checks were being  
3 issued and drawn against the Naval Prize Fund?

4 THE WITNESS: The period is then  
5 two years. When exactly he was promoted I  
6 will check up that date.

7 Q Fine.

8 What position did he hold at the time  
9 you conducted your investigation?

10 A He was judge advocate of the Navy,  
11 Naval law directorate.

12 Q Does he continue to hold that position  
13 today?

14 A I don't know. He is still there in  
15 the Naval law directorate.

16 Q He is still in the Naval law director-  
17 ate.

18 A Yes.

19 Q Did he sign every check drawn on the  
20 Naval Prize Fund made payable to the order of  
21 cash?

22 A Yes.

23 Q That is to say, every check which is  
24 the subject of this inquiry was signed by him,  
25 is that correct?

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1 hcr Nand 192

2 order or cash? How were they paid?

3 THE WITNESS: Who, sir?

4 THE MAGISTRATE: The recipients  
5 of the fund, those ex-servicemen who did get  
6 their money, did they receive it by check or by  
7 cash?

8 THE WITNESS: The bank account  
9 shows -- the statements of bank account shows  
10 that some officers were paid through individual  
11 checks in their names.

12 THE MAGISTRATE: In other words, were  
13 any of these people paid in cash either Mr.  
14 Jhirad or Mr. Sharma?

15 THE WITNESS: No evidence came  
16 forward to that effect. Others were paid  
17 through money orders against the pay orders  
18 which were issued in favor of the postmaster.

19 THE MAGISTRATE: Proceed, Mr.  
20 Sadowsky.

21 Q Did you during the course of your  
22 investigation interview P. L. Sharma?

23 A Yes.

24 Q Did you present to the magistrate a  
25 statement of P. L. Sharma?

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1 hcr

Nand

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2 this case. I am asking the general way, Mr.  
3 Nand. I know how you think it happened in  
4 this case. I am asking how you do it generally.

5 THE MAGISTRATE: Have you ever had  
6 occasion to buy a postal money order?

7 THE WITNESS: There is a printed  
8 form for remitting money. You fill out that form  
9 and tender the money along with commission,  
10 remittance charges about with cash -- cash can  
11 also be used.

12 Q So you purchased money orders with  
13 cash?

14 THE MAGISTRATE: He said cash can also  
15 be used.

16 Q Can you purchase a money or or could  
17 you purchase a money order at the time of these  
18 offenses with a bank check, with a check drawn on  
19 the bank? Could you go into the post office with  
20 a check made payable to the post office?

21 A I don't know if it can be done.

22 THE MAGISTRATE: He doesn't know.

23 MR. SADOWSKY: That's something that  
24 has to be established.

25 MR. LOUIS STEINBERG: If this is

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1 hcsdg

2 statement which you gave to him, so I gather there  
3 is no objection to its authenticity.

4 Is there any other objection?

5 Mr. Steinberg, what say you?

6 MR. LOUIS STEINBERG: I have no objection.

7 THE MAGISTRATE: It may be marked as

8 Exhibit G.

9 (Respondent's Exhibit G received in evidence.)

10 MR. SADOWSKY: Your Honor, at the last  
11 hearing we asked that the Government of India  
12 produce two bank accounts maintained by the  
13 respondent; one at the National Grindlays Bank  
14 branch in Bombay and the other one was the  
15 American Express, and I call for its production.

16 THE MAGISTRATE: These were documents  
17 which India did not have at the time and would  
18 not necessarily had been able to locate, but I  
19 will ask them: Have you been able to find such  
20 bank accounts?

21 MR. LOUIS STEINBERG: No.

22 MR. SADOWSKY: I call the Court's  
23 attention to the fact that in each one of the  
24 cases presented by the Government of India there  
25 is a list of Exhibits which will be offered at the

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1       hcsg

2                   THE MAGISTRATE: I don't think it  
3       contradicts anything. You haven't proved that  
4       he never had credit balances in any of the bank  
5       accounts.

6                   MR. EDWIN STEINBERG: No, but certainly  
7       the statement that the presumption would be that  
8       it would be unfavorable to the Government of  
9       India's case I don't think is warranted.

10                  THE MAGISTRATE: That's a presumption  
11       of law which pertains in a situation when he  
12       asked you to produce this evidence a week or so  
13       back.

14                  MR. SADOWSKY: Ten days ago.

15                  THE MAGISTRATE: It isn't a question  
16       of time. You obviously could have gotten --

17                  MR. EDWIN STEINBERG: If he wanted it  
18       as a matter of defense, he had six months to get  
19       it.

20                  THE MAGISTRATE: You have it; he  
21       doesn't. You have it, and you are in India,  
22       and he is not.

23                  MR. EDWIN STEINBERG: We don't have  
24       all of the documents that are on that list.  
25       That is the point. Only certain things.

1 hcsq

2 THE MAGISTRATE: It says in effect you  
3 had them.

4 MR. EDWIN STEINBERG: Not everything was  
5 made part of the record, not all of the witnesses.

6 THE MAGISTRATE: I am not asking if you  
7 have it here in New York. I am saying you have it  
8 in New Delhi.

9 MR. EDWIN STEINBERG: I just feel that the  
10 inference being drawn is not correct.

11 THE MAGISTRATE: You are overruled on  
12 that point.

13 Proceed, Mr. Sadowsky.

14 MR. SADOWSKY: I call Mr. Jhirad, your  
15 Honor.

16  
17 E L I J A H . E P H R A I M J H I R A D ,  
18 called as a witness, having been first  
19 duly sworn, was examined and testified  
20 as follows:

21

22

23

24

25

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1 hcsq

Jhirad - direct

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2 A If I recall, he was either the  
3 Deputy Chief of Naval Staff or he was Flag Officer  
4 commanding Indian Fleet; one of the two. I don't  
5 remember precisely which one.

6 MR. LOUIS STEINBERG: I move to strike it  
7 on the ground that the witness does not remember.

8 THE MAGISTRATE: Overruled. He was a  
9 high Indian official in the Navy, regardless of  
10 what capacity he was in.

11 Q Did you have a conversation with him  
12 prior to your departure?

13 A Yes, prior to my departure I had  
14 conversation with Admiral Katari.

15 Q What was the substance of that  
16 conversation?

17 A The substance was --

18 MR. LOUIS STEINBERG: I object to that.

19 THE MAGISTRATE: Overruled.

20 A The substance was that I was going to  
21 London to attend the World Jewish Congress  
22 Conference. He informed me that he had information  
23 that the Special Police Establishment were taking  
24 a special interest in my activities in respect of  
25 Israel and the World Jewish Congress, particularly

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2 convention on the territorial sea, the convention  
3 on the high seas, convention on the continental  
4 shelf and on fisheries, and the leader, of course,  
5 of my delegation was the Law Minister, Mr. Ashoka  
6 Singh, and he in the latter part of the conference  
7 left me to handle a majority of the  
8 preliminary sessions.

9 Q Did you return to India with a draft of  
10 the conventions?

11 A I in fact signed the final act on  
12 behalf of India and returned and submitted my  
13 report to the law minister.

14 Q Were you summoned by the Defense Minister?

15 A Yes, I was summoned by the Defense Minister,  
16 Mr. Krishna Menon.

17 Q Did you have a conversation with Mr.  
18 Menon at that time?

19 A Yes, I did have a conversation with  
20 reference to the convention.

21 Q What did he say to you?

22 A He said to me that he had just returned  
23 from a cabinet meeting where the law minister  
24 had cited me in support of the view that India  
25 should sign these conventions, but he, Mr. Krishna Menon

2      felt that he could not agree to the conventions,  
3      that I had been responsible particularly for those  
4      clauses in the conventions which would allow  
5      free passage to the Israelis in the Gulf of  
6      Akabah, and secondly that I should not have  
7      brought about compromises between the USA and  
8      Russia on certain of the matters because he  
9      said to me that we are a third world and our  
10     stand lies in the two super powers being at  
11     loggerheads.

12     Q      Did India ever sign these conventions?

13     A      To my knowledge, they have not signed  
14     the conventions until now.

15     Q      Did you find that you were under  
16     surveillance during this period?

17     A      Yes, during this period I became the --  
18     the surveillance became very extreme. My telephones  
19     were tapped, my letters were being opened, my  
20     house was being watched.

21     Q      Would you say that during this entire  
22     period that India had a hostile attitude towards  
23     Israel?

24     A      Entirely hostile attitude.

25     MR. LOUIS STEINBERG: Object to that.

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2 of the state -- when the President of Israel  
3 was going to Nepal, his plane made a stop in  
4 New Delhi, and not a single person from the  
5 Government of India was present there to pay him  
6 respects.

7 I went -- I went to the airport and  
8 waited on the President, but when I did so, I  
9 was watched very closely by two police officers.

10 Q Did you at one time lend a car to the  
11 Israeli Consulate?

12 A Yes, sometime in '61 or '62 I lent my  
13 car to the Consulate of Bombay to tour Northern  
14 India. A few days later I was approached by a  
15 police officer who asked me whether that particular  
16 car with that registration number belonged to me.

17 I asked him why he wanted to know, and  
18 he said he was making some routine inquiries.

19 Q Now, Mr. Jhirad, you told us that in  
20 1957 you went to the World Jewish Conference in  
21 London. Did you attend the World Jewish Conference  
22 again in 1959?

23 A Yes, in 1959 I went to the World Jewish  
24 Congress again.

25 Q Once again, did you have some conversation

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2 with Admiral Katari?

3 A Yes, this time again I had conversations  
4 with Admiral Katari and he said to me that the  
5 S.P.E. were very actively investigating me and that  
6 I should be careful.7 I think informed him that if my  
8 association with the World Jewish Congress or  
9 Jewish Affairs in any way embarrassed him, I would  
10 be prepared to resign my office, but he said that  
11 so far as the Navy was concerned, they had nothing  
12 against me, and he was merely informing me as a  
13 friend that I might be in serious trouble.

14 Q In 1963 was --

15 A In 1963 ---

16 Q In 1963 was your house and office subject  
17 to a search warrant?

18 A Yes.

19 MR. LOUIS STEINBERG: I object to that as  
20 leading.21 THE MAGISTRATE: Too late now; he has already  
22 led him, but go ahead.23 A In 1963, in February 2, 1963, Mr. J. P.  
24 Sharma, the person who has initiated the case, the  
25 present case, came to my office with the search

2 warrant, accompanied by two Naval officers.

3 He showed me the search warrant, but  
4 he didn't give me a copy and it appeared that he  
5 had obtained the search warrant on the ground that  
6 I had been using the Government's telephone and  
7 had not paid for it, and on the grounds that I  
8 was engaging in trade.

9 On the basis of this, he searched my office,  
10 my house, and all the brokers with whom I had  
11 business.

12 Q Did this search result in any charges  
13 being brought to you by the Law Ministry?

14 A This search resulted in the S.P.E.  
15 finding that I had paid for every single telephone  
16 call and they reported to the Ministry of Defense  
17 accordingly, but they still insisted that I should  
18 be prosecuted for conducting trade.

19 This recommendation was turned down by  
20 the Law Ministry as being without any substance.

21 Q And so that the Law Ministry did not  
22 pursue the case against you; is that correct?

23 A That is quite so.

24 Q Did you participate annually in the  
25 celebration of Israel's independence day?

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2 A They maintain diplomatic relations with  
3 the Arab bloc. In fact, if I may add on this  
4 question of the Israelis visiting me --

5 MR. LOUIS STEINBERG: No, I object to any  
6 voluntary statement.

7 THE WITNESS: This is only a continuation  
8 of my answer.

9 THE MAGISTRATE: He says it is a  
10 continuation of his prior answer.

11 Proceed.

12 THE WITNESS: On one occasion I had a  
13 telephone call from Mr. A. N. Jha, who was the  
14 Foreign Secretary, and he said to me that since  
15 my home was the place where I invited Israeli  
16 dignitaries, it would be a good thing if I would  
17 also invite somebody from the Government of India  
18 to be present.

19 I informed him that I have no objection  
20 if he sent an officer of suitable rank, but that  
21 I could not possibly accept a junior officer  
22 coming to me on those occasions.

23 THE MAGISTRATE: Did he send a senior  
24 officer?

25 THE WITNESS: They never did.

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1 hsg

Jhirad direct

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2 THE WITNESS: After that I went to  
3 Geneva, and we decided to take a holiday in Geneva  
4 for some time.

5 Q How much time did you spend in Geneva?

6 A Actually as it turned out, we spent  
7 about a year in Geneva.

8 Q During this period did you determine that  
9 you would not return to India?

10 A Yes. Later in the year in 1966 I  
11 determined that I wouldn't be going back.

12 Q Will you tell us why you reached this  
13 decision?

14 A I reached --

15 MR. LOUIS STEINBERG: I object to that.

16 THE MAGISTRATE: I will allow it.

17 A I reached this decision for two reasons:  
18 First of all, my wife's health had gone down. She  
19 said she could not stand the strain of the  
20 surveillance which we have experienced in India  
21 for the past many years, and she in fact said  
22 that if I wanted to go back, she would not  
23 accompany me.

24 I also realized, having sort of  
25 breathed free air, there was no point in my going

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2 and trying to fight forces, which I was not able  
3 to fight.

4 Q At the time you reached this  
5 decision, did you have any knowledge whatsoever  
6 of the charges which are the subject of this  
7 hearing?

8 A Not at all.

9 In fact, I was in touch with the  
10 Indian Ambassador there, who was a representative  
11 of the United Nations. I attended -- I gave a  
12 lecture at which his representative was present,  
13 taking copius notes.

14 Q That was in Switzerland?

15 A Yes.

16 Q When did that take place?

17 THE MAGISTRATE: I don't think the exact  
18 date is important; is it?

19 MR. SALOWSKY: No.

20 Q Just briefly.

21 A I think it was in November or December  
22 of 1966.

23 It was International Lawyers Club in  
24 Geneva, which invited me to talk on the law of  
25 the sea, law of the sea conventions.

2      A      I was in contact with the attorney general,  
3      who was then presently in Geneva in regard to the  
4      Indo-Pakistan dispute.

5      THE MAGISTRATE:      I know the attorney  
6      general of India while he was in Geneva?

7      THE WITNESS:      Yes.

8      THE MAGISTRATE:      When?

9      THE WITNESS:      During the months --

10     I should say from -- I saw him about three or four  
11     times, sir, between 19 -- between September, 1966 and  
12     July, 1967.

13     Q      What was his name, the attorney general?

14     A      Mr. C. K. Daphtary.

15     I also met with the legal advisor of the  
16     foreign office, Mr. D. A. -- may I get the name a  
17     little later?

18     THE MAGISTRATE:      I think it is good  
19     enough just to give his position.

20     THE WITNESS:      He is the legal advisor  
21     of the Foreign Office.

22     Q      You met him in Switzerland?

23     A      Yes.

24     Q      What was your occupation when you  
25     migrated to Israel?

2 A Very frequently. In fact, that's our  
3 practice in India, to take many fees in cash,  
4 particularly when they refer to individual  
5 consultations.

6 Q Did you receive cash from any other  
7 transactions?

8 A Yes, I had business in the Commodity  
9 Exchange, and in respect of those transactions,  
10 I received large sums of money in cash.

11 Q Are you saying to us that transactions  
12 on the Commodity Exchange were dealt in cash and  
13 not by check?

14 A The way the Commodity Exchange worked in  
15 most places in India was that if the price went up  
16 or down during a session, a bell would ring and  
17 the persons concerned had to make up the difference  
18 immediately in cash with the people concerned.

19 There was no -- that is why most of this  
20 work was done on a cash basis.

21 Q That's posting money to cover a contract;  
22 but also upon the sale of a contract?

23 A Even upon the sale of a contract, they  
24 came and gave me the money. If they wanted, they  
25 took the money.

Proceed.

THE WITNESS: Persons who were in the Service, in active service, were mostly paid by checks. A few -- substantial amount also were paid in cash, but the majority were paid by money orders in respect of which either cash was paid to the post office or sometimes checks or sometimes bank orders.

Q Now, did you ever advance cash for the purchase of money orders or for the transmittal of money orders?

A The system which I adopted in my office was that I did not keep any balance of cash apart from a very small balance of about 50 rupees with Mr. Barwaj, and whenever they wanted sums of money, I advanced the money in cash from my own personal cash, and from time to time, as was proper, I would reimburse, I would cash the money from the Ashoka Hotel, Prize Money Branch, provided to my office, and thereupon having adjusted the account I would reimburse myself.

MR. LOUIS STEINBERG: I move to strike it out on the grounds that it contradicts the evidence.

2 matters of defense.

3 THE MAGISTRATE: This isn't a matter of  
4 defense. It is a matter of irrelevancy.

5 I don't know that his maintaining of  
6 other funds, even assuming there were no shortages,  
7 has anything to do with this case.

8 MR. SADOWSKY: I withdraw the question.

9 THE MAGISTRATE: How nearly done are you?

10 MR. SADOWSKY: I am practically at the  
11 very end, your Honor.

12 Q You say, Mr. Jhirad, there came a time  
13 when you relinquished your office to someone else.  
14 Who was that?

15 A When I gave up my office on the day that  
16 I gave up my office, my successor had not come.  
17 He arrived about two or three days later. I never  
18 saw him, but I gave my office over to Commodore  
19 Cameron who was Chief of Personnel.

20 MR. SADOWSKY: I have no further questions.

21 THE MAGISTRATE: Would you like to  
22 cross examine now, Mr. Steinberg, or would you  
23 mind if I took this matter that's waiting? That  
24 should take about 10 minutes, and then you can  
25 proceed.

2 that discretion. If it had the power it would be im-  
3 providently exercised in favor of the admission of  
4 affidavits because it does not give the right to the  
5 respondent to prepare a defense.

6 I might also add that I have further objec-  
7 tion to the document on the ground that it is not  
8 sworn to. It is a statement; it is not an affidavit,  
9 and it is a statement made before the magistrate, and  
10 it is simply -- well, it is not signed, although there  
11 is the magistrate's signature line on it, the document  
12 is not signed. There is a certification that "The  
13 above statement is made in my presence and on my  
14 dictation," but nowhere does it say that it was a  
15 sworn statement.

4 16 THE MAGISTRATE: Let me look at the document  
17 please.

18 (Document handed to Magistrate.)

19 THE MAGISTRATE: With respect to the question  
20 as to whether it is signed, I see both on the first  
21 page and on the second page the letters "SD" which I  
22 take it to be an abbreviation for signed.

23 Then I see "K.B. Mathur" and a date.

24 I take it that this is meant to be a  
25 certified copy of an original document on file before

2 the Magistrate in India, and, as such, it would indi-  
3 cate that the original was signed by Mr. Mathur.  
4 So that to that extent I take it it is a signed  
5 statement.

6 As to whether it is sworn to or not, the  
7 preamble indicates that the testimony has been taken,  
8 or the statement has been taken before two judicial  
9 magistrates in Delhi, pursuant to section 164  
10 Criminal PC-I think it is Penal Code, as I recall;  
11 we had the Indian Penal Code here before us last time.  
12 Does anybody happen to have a copy?

13 MR. SADOWSKY: I do.

14 THE MAGISTRATE: Let me see Section 164.

15 MR. SADOWSKY: Yes, and there is another  
16 section I would call the Court's attention to.

17 I will give the Court 164.

18 THE MAGISTRATE: The section involves con-  
19 cerns the power to record statements and confessions  
20 by magistrates of the First and Second Class. It is  
21 noted in this document that both magistrates are first  
22 class magistrates, and it provides in the second sub-  
23 section of that section that statements shall be  
24 recorded in search of the manners hereinafter pre-  
25 scribed for recording evidence as in his opinion

2 best fitted for the circumstances of the cases.

3 MR. SADOWSKY: There is another section -

4 I looked at it just a few minutes ago - which states  
5 that they may take sworn statements or not as they  
6 choose. I will try to find it for you in there.

7 THE MAGISTRATE: I don't think the question  
8 of whether or not it is sworn to is what really matters.

9 I believe that certain judicial systems do not believe  
10 in the administering of an oath as such. What I think  
11 is important is whether or not this is proper eviden-  
12 tially in India, and I gather it is.

13 MR. SADOWSKY: If you will look at the foot-  
14 note to 164 appearing in the text, that would be some  
15 indication that is not admissible in evidence.

16 THE MAGISTRATE: Well, the footnote says  
17 that a statement made under Section 164 is not evidence  
18 but is corroborative of what the witness has said in  
19 committal proceedings, and cites a case. I am not  
20 certain what that means.

21 There is a cross reference in here concerning  
22 a recording and signing as provided in Section 364.

23 As best I can interpret these two sections,  
24 analogizing them into our legal system, both India and  
25 the United States having inherited their legal systems

2 from the English Common Law System, and therefore being,  
3 at least in broad outline, similar, what this document  
4 amounts to or in similar to would be the statement of  
5 a complaining witness on a complaint filed in the  
6 United States Court, which statements are sworn to  
7 in the presence of a Magistrate and which are not  
8 admissible as evidence as such, but are used as a  
9 finding of probable cause for the issuance of an  
10 arrest warrant for the person so charged.

11 As such it would seem to me to be admissible  
12 in this proceeding in this court, and I will overrule  
13 your objection, although if you wish to present any  
14 expert testimony concerning Indian law to the extent  
15 that this would not be proper for probable cause  
16 purposes, even in India, I will be happy to hear that  
17 later on.

18 MR. SADOWSKY: All right, then we won't  
19 conduct a voir dire, and I will reserve my right on  
20 that.

21 MR. LOUIS STEINBERG: May I look at that  
22 again, please?

23 THE MAGISTRATE: Let's mark it in evidence  
24 first.

25 What number are we up to, do you recall?

2 Q What brought you from Brussels to  
3 Switzerland? Was was the necessity for that?

4 A There were two reasons, actually. I  
5 wanted a little holiday for myself and my family,  
6 which we had not had for about three years, and  
7 one of the reasons also for choosing Switzerland  
8 was that I was able to get to my clients in France  
9 and Germany with whom I had business.

10 Q While you were in Switzerland did you  
11 form the intention of never to go back to India?

12 A Yes, that was sometime in November or  
13 December of 1966.

14 Q Now, that had nothing to do with your  
15 fear of prosecution?

16 A I wasn't aware of any --

17 Q Is that right?

18 A Obviously not.

19 Q But you didn't go back?

20 A No, I did not.

21 Q Now, when did you form the intention to  
22 go to Israel?

23 A I went to Israel, I think, if I remember  
24 right, the end of January 1967.

25 THE MAGISTRATE: The question was, when

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2 THE MAGISTRATE: What is his first name?

3 THE WITNESS: S. L. Watel.

4 Q What is his address?

5 A He lives in Malvianagar.

6 Q So that the only inkling that you gave

7 your junior counsel that you might not return was

8 that you might not return for about a week?

9 A That is right, because I had engagements

10 abroad.

11 Q You had engagements abroad?

12 A Yes. I had my clients abroad whose

13 work I was attending to.

14 Q What engagements?

15 A I had mentioned a list of the companies

16 for whom I was advising, your Honor - Regie Renault,

17 and the French group of drilling companies.

18 THE MAGISTRATE: The drilling companies?

19 THE WITNESS: Drilling companies.

20 Q These were your clients where, in the

21 United States?

22 A No, in France.

23 Q But you never did go to France, did you?

24 A Oh, yes, I visited France when I was in

25 Switzerland a number of times.

2 Q So now you went to Brussels, you went  
3 to France, you went to Switzerland --

4 A To France I went for a day or so.

5 Q -- you went to Tel-Aviv?

6 A That is right.

7 Q And then you came to the United States?

8 A That is right.

9 THE MAGISTRATE: This last question has  
10 been a very long one.

11 THE WITNESS: Yes.

12 MR. LOUIS STEINBERG: I know I am ex-  
13 hausting your patience, and I beg you to forgive  
14 me.

15 I think you have something on your mind,  
16 so I will stop.

17 THE MAGISTRATE: I have something to ask:

18 BY THE MAGISTRATE:

19 Q You spoke of the fact that you attended  
20 a number of World Jewish Congresses in earlier years?

21 A Yes, sir.

22 Q Did you ever take vacations in other  
23 countries following those conferences?

24 A Yes.

25 Q When and where?

2 A In 1957 in England and Israel.

3 Q Where was the conference?

4 A The conference was in London.

5 Q And you stopped off in Israel on your  
6 way back?

7 A Yes. I was in London itself for about  
8 two or three weeks and I came -- I went to Israel.

9 Q How long did you stay in Israel?

10 A I must have been for a week or ten days.

11 Q Any other times?

12 A I used to go abroad almost every year from  
13 1961.

14 Q I mean in connection with these World  
15 Jewish Congresses did you take extended vacations  
16 following any others?

17 A I generally used to combine my vacations  
18 with them.

19 Q And you would be gone on the average for  
20 how long?

21 A Well, I should say I would normally go  
22 for about a month because I couldn't take more than  
23 that time off when I was with Naval Headquarters.

24 Q When does the Jewish New Year begin?

25 A The Jewish New Year begins sometime in

1 slcg

Jhirad-cross

120

2 September.

3 Q When you left India for Brussels in  
4 1966 you obviously had a visa for Belgium.

5 A Oh yes.

6 Q Did you have a visa for any other country  
7 as of the time you departed?

8 A Yes, I had a visa. In my passport, sir,  
9 you will find I had a visa for probably Germany; I  
10 had a visa for France and I had a visa for Italy

11 Q How about Switzerland?

12 A And Switzerland.

13 Q You had that before leaving India?

14 A Before leaving India, yes.

15 Q When did you get a visa to enter Israel?

16 A A visa to enter Israel I actually got  
17 sometime in January of 1967.

18 Q I was of the understanding that you made  
19 a brief trip to Israel while you were in Switzerland.

20 A Yes.

21 Q That would have been early -- that would  
22 have been in 1966?

23 A No, that was in January 1967. And  
24 then I went to Israel later in the year, in August  
25 1967.

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2 decision, your final decision that you were never going  
3 to return to India was not a decision made lightly or  
4 hastily?

5 A No, sir.

6 Q It was a matter that took some thinking  
7 about and discussion with your family, and so on?

8 A Undoubtedly sir.

9 Q And you finalized that decision you say  
10 sometime in November or December of 1966?

11 A Yes.

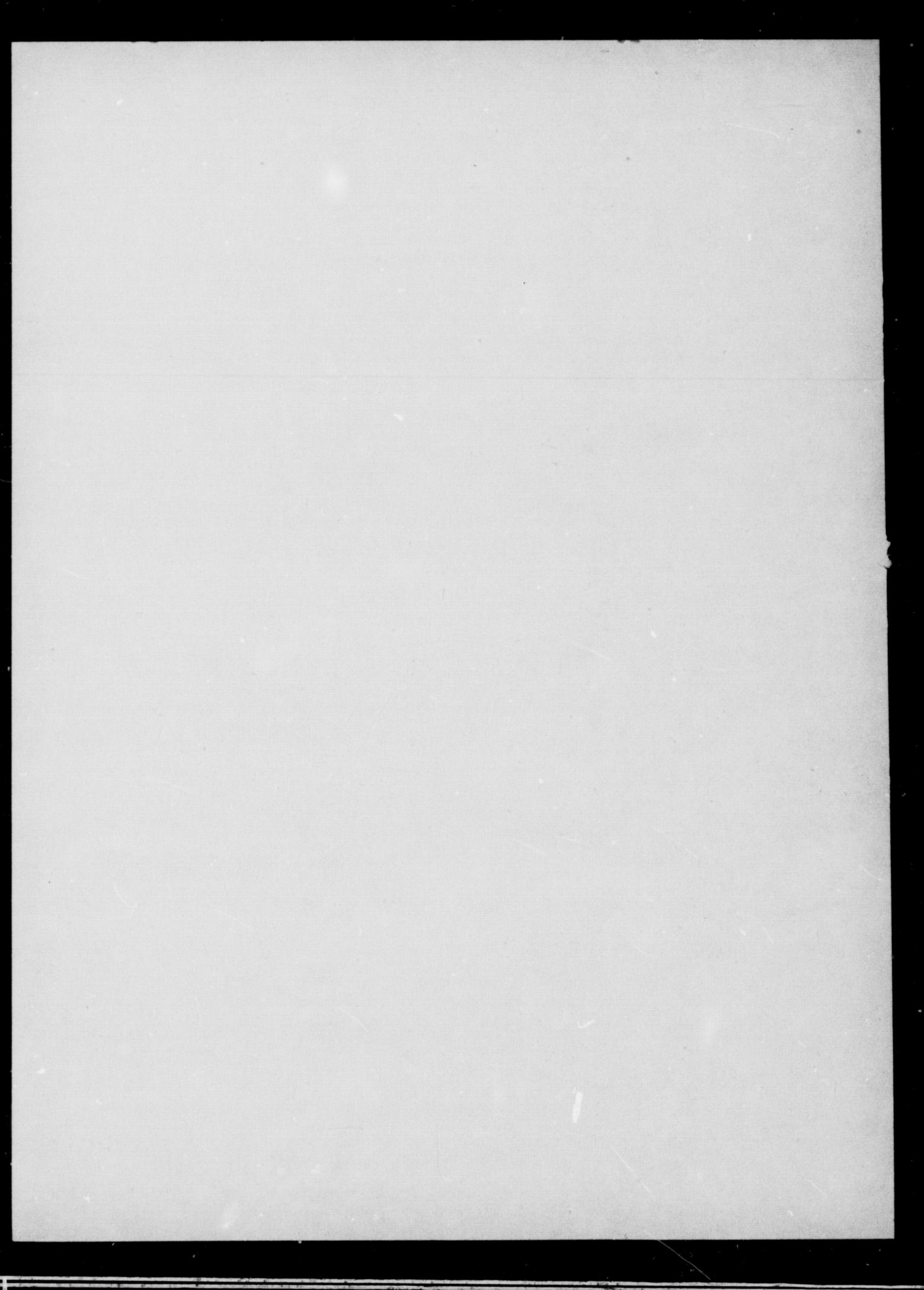
12 Q Would you say you first started consider-  
13 ing it? When did the idea first occur to you that  
14 you might not go back to India at all?

15 A It was about that time, sir, about  
16 November or December.

17 It didn't take us long to make that  
18 decision, I can say that, because, first of all,  
19 my wife, as I mentioned to you, had been under  
20 severe stress at that time, and I mentioned to you  
21 I had been under severe strain in India; so when I  
22 did decide, when I decided to cut off from India,  
23 it didn't take so long to decide what we were going  
24 to do.

25 Q When you left India and went to Brussels,

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C H A R

Police Station C.I.A.(I) S.P.E./C.B.I. New Delhi.

District..Delhi

Name, address and occupation  
of complainant or informant...Shri J.P. Sharma, Supdt. of Police,  
S.P.E./C.I.A.'I', C.B.I., New Delhi.

| Name and addresses of accused persons sent up for trial | Names and address of accused persons not sent up for trial whether arrested or not arrested including absconders, (show absconders in red ink) | Property (including found with party where, when and and whether forwarded to Magistrate) |
|---|--|---|
| In Custody  | On bail or<br>recognition  | 2   |

Shri E.E.  
Jhirad, former  
Judge Advocate  
General of the  
Navy, Naval  
Headquarters,  
Ministry of Defence,  
New Delhi (not  
arrested)

Nil

Despatched at ..... a.m./p.m.

ATTESTED TRUE COPY

TRUE COPY TO Judicial Magistrate

Attestation

Attestation



(SIGNATURE OF)

Attested Signatures Of Shri  
H. L. Kakkar Addl. Chief Judicial  
Magistrate, Delhi

Charge Sheet No.25

Date. 14.X...1968.

First information  
report number.

R.C.15/66-CIA'I'.

Date. 2-7-1956.

ing Weapons) Names and address of  
culars of witnesses.  
by whom found  
arded toCharge or information, name of offence  
and circumstances connected with it, in  
concise details, and under what section  
of law charged.

4

5

As per list  
attached.

Shri E.E. Jhirad (ELIJAH EPHRAIM JHIRAD) accused, joined the Naval Headquarters at New Delhi in a Civilian capacity as Judge Advocate General of the Fleet on a 3 year contract on 11.11.1946. His contract was extended by a year but in May, 1950 in consultation with the U.P.S.C., he was finally declared as a substantive Judge Advocate of the Fleet with effect from 1.9.1948. In the year 1957 his designation was changed as Judge Advocate General of the Indian Navy and he continued to work in that capacity till 1.12.1964 when he proceeded on leave on half pay. During the aforesaid period Shri E.E. Jhirad, accused, was a public servant as defined in Section 21 of the Indian Penal Code.

Under the Prize Act, passed by the Government of the United Kingdom in December, 1948, a decision was taken to make a grant of Prize Money out of the proceeds of Prize captured in World War-II and retained in the Supreme Court Prize Deposit Account, to such persons who were or had been members of His Majesty's Naval and Marine Forces or of the crews of His Majesty's ships of war or in the case of their death, to their representatives.

In pursuance of the decision taken under the said Act, an aggregate amount was allocated to the India-Pakistan Pool and under a joint proclamation signed by the President of India and the Governor General of Pakistan and issued simultaneously from New Delhi and Karachi on 1.2.1956, regulations governing the distribution of the grant out of the proceeds of Prize captured in the 2nd World War and allocated to India-Pakistan Pool and constituted into the Naval Prize Fund, were issued. According to this joint proclamation, individual officers and men who belonged to Naval Forces of undivided India, who had performed service at sea for a period of not less than 180 days between 3.9.1939 and 2.9.1945

....19...

Contd....2..

INVESTIGATING OFFICER) Attested Signature of S.I.A.  
N. L. K. As Addl. Commr. of Police  
Magistrate, Delhi.

*J. S. J.*  
R. L. V. 10/4/72  
Under Secretary (Passport)  
Delhi Administration Deptt

and who notified their claims in the manner prescribed in the proclamation entitled to participate, his share of prize money was made payable to

The total amount of India's share of Prize Money including inter sanction of the President of Prize Money for distribution to Naval Personnel by the Ministry of Defence vide letter dated 31.10.1958 in which in the United Kingdom, the Controller of Defence Accounts (Navy), Bom public fund to be designated by the Chief of the Naval Staff who would audit etc. of the Prize Money on the lines similar to those adopted in

The orders of the Chief of the Naval Staff designating "Naval Fund 1,48,025-19-7 was to be issued were conveyed to the Controller of Defence dated 25.11.58. The Controller of Defence Accounts (Navy), Bombay, then sent it to the then Chief of the Naval Staff, Vice Admiral R.D. Katar Commodore G.S. Kapoor and Shri E.E. Jhirad, accused, was passed in Dec the Central Bank of India, Ashoka Hotel Branch, New Delhi and that the described as administrators of the fund, with the counter-signatures (Naval Law). The resolution and the account opening form dated 15.12.1958, P.L. Sharma, Secretary of the fund, were sent to the above named bank and a current deposit account No.93 was opened by the Bank in the name of the Naval Prize Fund account was administered throughout by Shri E.E. Secretary of the fund, and by 31.12.1961, the entire amount which was sum of Rs.47.52paise, as balance in the said account.

The investigation has revealed that while a part of the withdrawal and by transfer of amounts to the Post Master, New Delhi G.P.O. mainly amount, was withdrawn in cash from the said Naval Prize Fund account countersigned by Shri P.L. Sharma as the Secretary of the fund. The various amounts withdrawn in cash from Naval Prize Fund at the Bank's

The investigation further revealed that Shri E.E. Jhirad, accused, during the aforesaid period deposited or caused to be deposited various amounts in cash from the said Naval Prize Fund account at the Bank Branch, Parliament Street, New Delhi. During the period 24.7.1961 to 29.9.1961, he withdrew in cash from the said Naval Prize Fund over property viz. The Naval Prize Fund in his capacity as Public Servant in respect of Rs.59,000/- detailed below:-

1. On 24.7.1961, a sum of Rs.30,000/- was withdrawn in cash from the said Naval Prize Fund account at the Bank Branch, Parliament Street, New Delhi, accused, who on the same day deposited Rs.30,000/- in cash at the National & Grindlays Bank Ltd., (Lloyds Branch), Parliament Street, New Delhi.
2. On 27.7.1961, a sum of Rs.8000/- (8000) was withdrawn in cash from the said Naval Prize Fund account at the Bank Branch, Parliament Street, New Delhi, accused. Again on 29.7.1961 a sum of Rs.4000/- was withdrawn in cash from the said Naval Prize Fund account at the Bank's counter by Shri E.E. Jhirad, accused. On 29.7.1961, Shri E.E. Jhirad, accused, deposited a sum of Rs.4000/- in cash at the National & Grindlays Bank Ltd., (Lloyds Branch), Parliament Street, New Delhi.
3. On 25.9.1961, a sum of Rs.30,000/- was withdrawn in cash from the said Naval Prize Fund account at the Bank Branch, Parliament Street, New Delhi, accused. On the following day a sum of Rs.14,000/- was withdrawn in cash from the said Naval Prize Fund account at the National & Grindlays Bank Ltd., (Lloyds Branch), Parliament Street, New Delhi.
4. On 27.9.1961, a sum of Rs.10000/- was withdrawn in cash from the said Naval Prize Fund account at the Bank Branch, Parliament Street, New Delhi, accused, who on the same day deposited a sum of Rs.10000/- in cash at the National & Grindlays Bank Ltd., (Lloyds Branch), Parliament Street, New Delhi.

The investigation has further revealed that there were no withdrawal deposits mentioned at S.Nos.1 to 4 above.

Some of the Naval personnel who were entitled to a share of Prize Money.

ATTESTED

Attested Signatures Of Shri  
N. L. Kakkar Addl. Chief Judicial  
Magistrate, Delhi.

Addl. Chief Judicial Magistrate  
Delhi



ation were allowed to participate in the Prize Money. In the case of death of a person his representative viz. wife, legitimate child, father or mother.

Interest came to £ 3,03,471-0-2, out of which a sum of £ 1,48,025-19-7 was apportioned by the personnel in India. The sanction of the President was conveyed to the Chief of the Naval Staff. It was also mentioned that on receipt of the amount from the High Commission for India, will issue a cheque for the equivalent of the aforesaid amount in the name of non-aid also issue necessary instructions in respect of payments, distribution, accounting and in respect of other non-public funds.

"Prize Fund" as the non-public fund to which the cheque for the equivalent of Defence Accounts (Navy), Bombay, by the Naval Headquarters, New Delhi, vide letter then issued a cheque for Rs.19,73,679.72 paise in favour of Naval Prize Fund and i. On receipt of the cheque, a resolution signed by Vice Admiral R.D. Katari December, 1958, that a banking account in the name of Naval Prize Fund be opened with the account could be operated by one of the three signatories to the resolution who were of the Secretary of the fund who was named as Shri P.L. Sharma the then Staff Officer 1958 duly signed by Shri E.E. Jhirad, accused, the two other administrators and Shri alongwith the cheque received from the Controller of Defence Accounts (Navy), Bombay, of Naval Prize Fund on 15.12.1958, with an initial deposit of Rs.19,73,679.72 paise. Jhirad, accused as Administrator with the counter-signatures of Shri P.L. Sharma, the initially deposited plus the interest earned thereon was withdrawn leaving a small

rawals was made by way of issue of individual cheques to some of the entitled personnel for issue of Money Orders to some other entitled personnel the major portion of the through 91 cheques signed by Shri E.E. Jhirad, accused as Administrator of the fund and investigation has further revealed that Shri E.E. Jhirad, accused, personally received counter.

sed, having withdrawn large amounts in cash from the Naval Prize Fund account as amounts in his personal account with the National & Grindlays Bank Ltd., Lloyds 27.9.1961 Shri E.E. Jhirad, accused, being entrusted with property or dominion want and Administrator of the said Fund, committed criminal breach of trust in

the Naval Prize Fund. The amount was received at the bank's counter by Shri E.E. cash in his personal account with the National and Grindlays Bank Ltd., (Lloyds

from the Naval Prize Fund. The amount was received at the bank's counter by Shri E.E. drawn in cash from the Naval Prize Fund and the amount was received at the Shri E.E. Jhirad, accused deposited a sum of Rs.10,000/- in cash in his personal 1, Parliament Street, New Delhi.

aval Prize Fund. The amount was received at the bank's counter by Shri E.E. deposited in cash in the personal account of Shri E.E. Jhirad, accused with Street, New Delhi.

the Naval Prize Fund. The amount was received at the bank's counter by Shri 5000/- in his personal account with the National & Grindlays Bank Ltd.

rawals from the personal bank accounts of the accused for making the

ize Money have, on being examined, stated that they did not receive their

6th August 1962  
S. L. V. -  
M. A. D. -

Under Secretary (Passport)  
Delhi Administration Delhi

10/4/72

The above facts disclose the commission of an offence u/s 409 I

Soon after the registration of the case Shri E.E. Jhirad, accused to be at Switzerland, and hence could not be arrested in this case. It from Switzerland may kindly be initiated and thereafter the accused may

ATTACHED

TRUE COPY

C  
Addl. Chief Judicial Magistrate  
Delhi

Illustrated Signatures of Shri  
S. L. Kakkar Addl. Chief Judicial  
Magistrate, Delhi.

Under Secretary (Passport)  
Delhi Administration Delhi



P.C. by Shri E.E. Jhira, accused.

ed left the country and has not returned to India so far. He is reported is prayed that proceeding for the extradition of Shri E.E. Jhira, accused be dealt with according to law.

SD/- JETHA NAND. 14.X.68  
DY. SUPDT. OF POLICE,  
S.P.B./C.I.A.'I',  
NEW DELHI.

Submitted in the Court by S.S. Puri, SPM.)

Special Magistrate, Delhi, in favour of trial pl.

SD/- S.S. Puri  
(S.S. Puri)  
S.S.P./C.I.A.'I')

N.W.Delhi

DL- 14.X.68

UNITED STATES COURT OF APPEALS  
SECOND CIRCUIT

ELIJAH EPHRAIM JHIRAD,

Petitioner-Appellant,

against

THOMAS E. FERRANDINA,  
United States Marshal  
Southern District of New York,

Respondent-Appellee

AFFIDAVIT  
OF SERVICE

STATE OF NEW YORK,  
COUNTY OF NEW YORK, ss.:

Juan A. Delgado, being duly sworn, deposes and says that he is over the age of 18 years, is not a party to the action, and resides at 596 Riverside Drive, New York, New York. That on November 14, 1975, he served 1 copies of Appendix to Appellant's Brief on

Steinberg & Steinberg, Esqs.,  
99 Park Avenue,  
New York, New York.

by delivering to and leaving same with a proper person or persons in charge of the office or offices at the above address or addresses during the usual business hours of said day.

Sworn to before me this  
14th day of November, 19 75

*Juan A. Delgado*

*John V. DeSposito*  
JOHN V. D'ESPOSITO  
Notary Public, State of New York  
No. 30-0932350  
Qualified in Nassau County  
Commission Expires March 30, 1977

